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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 106

THE UNITED STATES, PETITIONER

vs.

THE THAYER-WEST POINT HOTEL COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MAY 15, 1946
CERTIORARI GRANTED OCTOBER 14, 1946

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1232

THE UNITED STATES, PETITIONER

vs.

THE THAYER-WEST POINT HOTEL COMPANY

ON PETITION OF A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1 In the Court of Claims of the United States

45874

THE THAYER-WEST POINT HOTEL COMPANY, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Petition

Filed May 19, 1943

To the Honorable, The Court of Claims:

The above-named plaintiff respectfully represents and alleges:

I

The plaintiff is a corporation duly organized and existing under the laws of the State of Delaware, with its principal office in the City of Wilmington, State of Delaware.

II

That by Act of Congress, approved March 30, 1920 (41 Stat. 548), it was provided:

"That the Secretary of War is hereby authorized to lease land on the United States Military Reservation at West Point, for a term of not exceeding fifty years, to any corporation, company, or
2 individual, upon which to erect a hotel, and all other necessary buildings in connection therewith in accordance with plans and specifications submitted to and recommended by the Superintendent of the Military Academy, and approved by the Secretary of War. Said lease shall contain such conditions, terms, reservations, and covenants as may be agreed upon and shall also provide for just compensation to the lessees for the construction of said hotel, appurtenances, and equipments, to be paid to said lessees at the termination of said lease.

III

That on October 17, 1924, pursuant to the above-mentioned Act, the Secretary of War duly made executed and delivered an indenture of lease with and to Herbert Williams of Newburgh, New York, whereby certain land of the United States Military Reservation at West Point, New York, as therein described, was leased to said Williams, as lessee, for the term of fifty years from the date of lease, and the said lessee covenanted to erect upon said land a hotel in accordance with the plans and specifications there-

after to be submitted and to operate said hotel upon terms and conditions as therein provided; that a copy of said lease is hereto annexed, marked Exhibit "A" and made a part hereof.

IV

That on or about March 23, 1925, the said lessee, Herbert Williams, duly assigned the said lease by written assignment recorded in the Office of the County Clerk of Orange County, State of New York, to The Thayer-West Point Hotel Corporation, a corporation organized under the laws of the State of New York (herein called Hotel Corporation).

3

V

That in or about April 1925 the said Hotel Corporation commenced the construction of the hotel and finally completed and equipped the same for operation in or about September 1926, pursuant to and in accordance with the terms and conditions of said lease, and in accordance with plans and specifications approved by the Superintendent of the West Point Military Academy and by the Secretary of War; that the said Hotel Corporation upon the completion of the construction and equipment of said hotel properties as aforesaid, duly took possession of the same and thereafter owned, operated and managed the said hotel under and pursuant to the terms of the said lease.

VI

That in or about the month of March 1928, the American Trust Company as Trustee under a certain first mortgage (herein called the foreclosed mortgage), duly executed, and delivered by the said Hotel Corporation to American Trust Company and Charles H. Trismen, as Trustees, covering the said leasehold, buildings, appurtenances and equipment and all the right, title, estate and interest which the Hotel Corporation had or might thereafter acquire under the said lease, and under which $1,000,000 principal amount of First Mortgage and Leasehold Secured 6½% Sinking Fund Gold Bonds had been duly issued, commenced an action in the New York Supreme Court, Orange County, against the said Hotel Corporation to foreclose the said first mortgage by reason of the default by the Hotel Corporation in the payment of
4 interest on the mortgage, and for other defaults; that judgment of foreclosure in the said action was duly rendered, and entered in the Office of the County Clerk of Orange County on January 17, 1929, decreeing foreclosure of said mortgage and finding the principal amount with interest to be due thereunder

in the amount of $1,135,291.12; that thereafter, by judgment entered in the Office of the Clerk of Orange County, New York, on December 24, 1929, the said judgment of foreclosure was duly and unanimously affirmed on appeal by the Appelate Division of the Supreme Court, Second Department, and said judgment of foreclosure upon said appeal was modified to the extent of finding that the principal and interest due under said mortgage was $1,140,951.76; that said judgment of foreclosure affirmed and modified as aforesaid has never been reversed and duly became a final and subsisting judgment.

VII

That in the month of July 1930, pursuant to the said final judgment of foreclosure the said leasehold, hotel properties, appurtenances and equipment with all right, title, estate and interest therein, covered by the said first mortgage were duly sold at public foreclosure sale and were purchased by a Protective Committee organized and acting in behalf of certain of said first mortgage and leasehold secured 6½% bondholders owning bonds duly issued under said mortgage by the Hotel Corporation in the aggregate face amount of $879,400.00, which bonds were secured by the said first mortgage, foreclosed as aforesaid; that in November, 1930, the plaintiff herein, The Thayer-West Point Hotel Company was duly organized under the laws of the State of Delaware under the direction of said Protective Committee for the benefit of the said bondholders of the said Hotel Corporation represented by said Committee, and all of the issued capital stock and income bonds of the plaintiff (subject to a first mortgage bond of $125,000.00 issued by the plaintiff, to cover its expenses and its expenditure for equipment, under and secured by a mortgage now a lien on the hotel properties), were duly delivered to said bondholders in lieu of and in exchange for their first mortgage bonds of the Hotel Corporation and the said Committee duly assigned to the plaintiff all of its rights under said foreclosure sale; that on December 26, 1930, pursuant to said first mortgage foreclosure judgment and the sale thereunder, the said leasehold and all the right, title, estate and interest thereunder, together with all the buildings, improvements, fixtures, appurtenances and equipment of all kinds used in connection therewith, subject to said first mortgage, were caused to be duly conveyed and transferred by deed to the plaintiff herein, The Thayer-West Point Hotel Company by one Herbert B. Royce, the duly constituted Referee in the said mortgage foreclosure proceedings; that the deed given by said Royce as Referee to plaintiff herein as aforesaid was duly recorded in the Office of the Clerk of Orange County, New York, on January 3, 1931; that on or about December 20, 1930, Edward

J. Kelly, as Trustee in bankruptcy of the said Hotel Corporation, duly executed and delivered in quit-claim deed relating to said properties to the plaintiff; that on or about March 4, 1931 one Charles H. Trismen as Trustee of the foreclosed mortgage, duly executed and delivered a quit-claim deed relating to said properties to the plaintiff; that on or about March 18, 1931, one Byron C. Hawley as Substitute Trustee, duly executed and delivered
6 a quit-claim deed relating to said properties to the plaintiff; that all of the said quit-claim deeds are recorded in the Office of the Clerk of Orange County, New York; that in February 1931, L. Barth & Company duly executed and delivered a bill of sale to the plaintiff of certain furnishings and equipment contained and used in the said hotel; that in and by the provisions of said Referee's deed, and said judgment of foreclosure and sale, and said quit-claim deeds and said bill of sale, the plaintiff herein duly became vested with full and complete title to the said leasehold and the mortgaged premises and to all the said hotel properties, appurtenances, equipment, rights, title and interest therein.

VIII

That the plaintiff herein, The Thayer-West Point Hotel Company thereupon took possession as owner of said leasehold and said hotel properties, appurtenances and equipment therein and at all times with the knowledge and consent of the Secretary of War continued in possession thereof and operated and managed the same in accordance with and pursuant to the terms of the said lease down to March 10, 1943; that on January 5, 1943, the above-named plaintiff addressed a letter and caused the same to be delivered to the Secretary of War, a copy of which is hereto annexed marked Exhibit B and made a part hereof; that on February 5, 1943, the Secretary of War replied to the above letter, a copy of which reply is hereto annexed, marked Exhibit C and made a part hereof; that in accordance with the understanding and arrangement set forth in the said letters, the plaintiff herein duly delivered, on February 26, 1943, a notice of default to the Superintendent of the Military Academy at West Point and
7 the Secretary of War and also the waivers mentioned in the plaintiff's said letter, copies of which are hereto annexed as one exhibit marked Exhibit D and made a part hereof, and plaintiff did on March 10, 1943, discontinue operation of the said hotel and its properties, appurtenances and equipment and closed the said hotel at 9 o'clock A. M. Eastern War Time on said day, and immediately thereupon the Secretary of War acting by and through the Superintendent of the Military Academy at West Point, his agents and representatives, took over possession and occupation and management of the said hotel and all its properties,

appurtenances and equipment and has ever since continued in possession, management and control of the same; that on March 24, 1943, the plaintiff herein received a formal notice from the Secretary of War, declaring the lease forfeited under its terms.

IX

That in and by the terms and conditions of the said lease, it was provided that when the said lease came to an end either by the expiration of the term reserved therein or by reason of the forfeiture of said lease by the Secretary of War, just compensation shall be paid by the United States of America to the lessee or his assigns for the construction of the hotel appurtenances and equipment upon the demised premises; that on information and belief the total cost for the construction of the hotel, including appurtenances and equipment, together with all expenses properly attributable thereto, is the sum of approximately $1,932,000.00; that on or about April 21, 1943, plaintiff mailed to the Secretary of War a request that just compensation be paid for the con-
8 struction of said hotel, appurtenances and equipment; that no reply has been received thereto from the Secretary of War.

X

That no other action has been had on said claim in Congress or by any of the Departments of the Government; that no person other than the plaintiff is the owner thereof or interested therein; that no assignment or transfer of the said claim or any part thereof or interest therein has been made; the plaintiff is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets and no part thereof has been paid, although duly demanded; the plaintiff has at all times borne true faith and allegiance to the Government of the United States and has in no way aided or abetted or given encouragement to rebellion against said Government. The plaintiff is a citizen of the United States.

Wherefore, plaintiff asks judgment against the United States in the sum of One million, nine hundred and thirty-two thousand dollars, together with such further amounts to which the plaintiff may be entitled and to such other relief as to the Court may seem just and proper.

THE THAYER-WEST POINT HOTEL COMPANY,
By PHILLIPS M. PAYSON, *President.*

SEIBERT & RIGGS,
Attorneys for Plaintiff,
30 Broad Street, New York City, N. Y.

9 [*Duly sworn to by Phillips M. Payson; jurat omitted in printing.*]

10 *Exhibit A to petition*

This agreement made this 17th day of October 1924 between The Secretary of War of the United States of America, party of the first part, and Herbert Williams of Newburgh, N. Y., party of the second part, witnesseth:

That the said party of the first part pursuant to the power conferred upon him by the Military Academy Appropriation Act for the fiscal year ending June 30th, 1921, 66th Congress, H. R. 12467, approved March 30th, 1920, and in consideration of One Dollar, the receipt whereof is hereby acknowledged, has agreed to let and hereby does let to the said party of the second part, and the said party of the second part has agreed to take and hereby does take from the said party of the first part the following described parcel of land on the United States Military Reservation at West Point, viz:

All that tract of land on the United States Military Reservation at West Point, N. Y., lying between the southern boundary line of said reservation and a line six hundred (600) feet north of, and parallel to, said southern boundary line and east of the main roadway leading through said reservation.

Subject to the right of way of the West Shore Railroad Company. For and during the term of fifty years from the date of this lease.

The said party of the second part covenants that he will erect upon said premises a hotel and all other necessary buildings in connection therewith, substantially as set forth in the plans submitted by the party of the second part in connection with his bid to the Quartermaster of the Military Academy at West Point, complete plans and specifications to be hereafter submitted to, and approved in writing by, the Superintendent of the Military Academy at West Point and by the party of the first part.

11 Provided that this lease and the term hereby reserved shall be void unless the completed plans and specifications to be hereafter submitted shall be approved by the Superintendent of the Military Academy at West Point and by the Secretary of War, and unless construction of the hotel in accordance therewith is commenced within six calendar months from and after the execution and delivery to the party of the second part of this lease, and unless the construction of said hotel is completed on or before two years from the commencement of the construction thereof unless prevented by accident or unavoidable causes, and in such case as soon after such date as is practicable.

The party of the second part agrees that before work is commenced on said hotel building, he, his representatives or assigns, will cause to be executed to the party of the second part, or his assigns, and delivered to the Superintendent, U. S. M. A., by the contractor, or contractors, to whom the contract, or contracts, to build said hotel building are let, a bond in form and with one or more sureties satisfactory to the parties of the first and second parts, conditioned for the indemnity of the parties of the first and second parts against all mechanics', material men's and other liens, and the claims of all mechanics, material men, laborers, and others which may not be enforceable by lien, which may arise or be created in or about the erection of said hotel building, and that, when completed, as aforesaid, the said building and premises shall be free from all liens and claims whatsover, for the construction thereof; and further conditioned that said building shall be completed on or before two years from the commencement of construction thereof, unless prevented by accident or unavoidable causes, and in such case as soon after such date as is practicable.

Provided further that the party of the second part shall,
12 from time to time, establish standard rates for rooms and meals in said hotel, which rates shall be submitted to and shall be subject to the approval of the Superintendent of the Military Academy for the time being, and the following persons shall be entitled to a discount from said rates of twenty-five percent (25%) upon production of a card signed by the Adjutant of the Post or such other officer as may be designated by the Superintendent representing the bearer to be entitled thereto as follow :

(a) The Board of Visitors to the United States Military Academy and officers of the United States Government making tours of inspection at the Post.

(b) Parents and guardians of cadets.

(c) Officers of the United States Army on duty at the Post and their dependents when other quarters are not available.

(d) Officers and their dependents not under war department orders for such duty, but officially connected with athletic teams as coaches or trainers. There shall be no discrimination in the quality of service, meals or otherwise, against these classes as compared with other guests.

The total number of rooms in said hotel which shall be subject to such discount shall not at any one time exceed one hundred rooms.

Provided further that in times of congestion due to functions at the Post, when no other rooms are available, cots shall be pro-

vided in the rooms in said hotel for the accommodation of visitors to the Post for which an additional charge shall be made subject to the approval of the Superintendent of the Military Academy at West Point for the time being.

The party of the second part covenants and agrees that he, his representatives or assigns, will at all times keep the buildings and improvements on said demised premises and the equipment therein insured against loss or damage by fire for their full insurable value in companies satisfactory to the Superintendent, U. S. M. A., and furnish the Superintendent, U. S. M. A., with a complete list of all such insurance; that he will pay the premiums necessary for those purposes immediately as they become due; that in any mortgage which may be placed upon the buildings to be erected upon the demised premises, there shall be inserted a clause in substance that in case of fire the proceeds of any insurance shall be used by the mortgagee or trustee of said mortgage to restore the buildings to the conditions in which they were before the fire, or at the option of the mortgagee to remove the debris resulting from the fire and to clean up the premises, and such clauses shall obligate the mortgagee or trustee to so expend such moneys so far as may be necessary, provided that if the party of the second part, his representatives or assigns, shall at any time fail to insure or keep the premises insured as aforesaid, the party of the first part may void this lease upon notice to any mortgagee or trustee of any mortgage, and after affording such mortgagee or trustee of any mortgage reasonable opportunity to comply with this requirement of this instrument. 13

The party of the second part further covenants and agrees that in case of damage or destruction, from time to time, by fire or otherwise, to repair, restore, or rebuild the buildings and improvements on the demised premises, in accordance with plans and specifications to be approved by the Superintendent, U. S. M. A., with all reasonable dispatch; provided, that the parties of the first and second part may agree that the said buildings be not repaired, restored or rebuilt by said second party, as aforesaid, and as to the terms under which said repairing, restoring or rebuilding may be waived.

The party of the second part further covenants and agrees that he, his representatives or assigns, will also maintain in force at all times liability and compensation insurance covering visitors, guests, and their property, and employees of said hotel. 14

Provided further that said party of the second part shall keep the said hotel open for business every day during the continuance of this lease, except at such times as permission to close may

be given in writing by the Superintendent, U. S. M. A. The Superintendent shall have the right to close said hotel in cases of epidemic should he deem it necessary to do so.

Provided further that in case of any disagreement between the party of the second part and the Superintendent of the Military Academy at West Point regarding the rates to be charged for services in said hotel, the amount of such charges shall be determined by the Secretary of War after due presentation of the case by both parties, the decision of the Secretary of War to be final and controlling upon both parties.

Provided further that said hotel and buildings connected therewith, shall be used solely and exclusively for hotel purposes except that display rooms may be maintained either by the parties of the second part or by travelling salesmen, guests at the hotel, for the sale and display of merchandise to officers and cadets, and except also that the party of the second part may maintain or let out concessions for a barber shop, beauty parlor, news and cigar stands and the sale of such articles as are usually and commonly sold in connection with hotels in like localities.

The party of the second part further covenants for himself, his representatives and assigns, that he will not erect or permit to be erected on the demised premises any new buildings or make or permit to be made any addition to the said hotel building so to be erected or to any buildings which may at any time during the said term be erected upon the land hereby demised, except in accordance with plans and specifications previously approved by the Superintendent, U. S. M. A.

15 The party of the first part further covenants and agrees that the party of the second part shall be authorized to cut and haul surplus ice from ponds and bodies of water on the reservation to the extent of the requirements of said hotel and at such times and places as may be designated by the Superintendent of the Military Academy at West Point, and permit the party of the second part to construct storage buildings therefor at the pond or elsewhere as the Superintendent may direct.

The party of the first part further covenants and agrees that electricity will be furnished to the party of the second part for use in said hotel for both light and power at a charge not exceeding that paid by the Quarter Master Department to the United States Military Academy. The party of the second part to connect to the post system at point designated by the Superintendent of Military Academy at West Point.

The party of the first part further covenants and agrees to supply to the party of the second part for use in said hotel and buildings such water as may be necessary for the use of the party of the second part in connection therewith without charge except the

actual expense of making the water connection which shall be made at such point as shall be designated by the Superintendent of the United States Military Academy at West Point.

Providing that the provisions of this contract respecting electric current and water supply shall be subject to any action that Congress may take in the future. A breach of any or all of said provisions by the Government resulting from future legislation or want of legislation by Congress shall create no claim in favor of the lessee or right of action against the United States.

The party of the second part shall have the right and privilege of connecting said hotel and buildings with the present sewerage system of West Point under the supervision of the United
16 States Military Academy at West Point without other charge than the expense of making such connection.

After the expiration of the present exclusive bus and taxi franchise which has heretofore been given by the United States Military Academy at West Point, the party of the second part, if unable to make satisfactory arrangements with such bus and taxi service, shall have the right and privilege of operating his own bus or taxi system between the West Shore Railroad Station and boat landing at West Point and said hotel, it being understood that the rates to be charged for transporting passengers on the Post of West Point shall be satisfactory to the Superintendent.

The party of the second part covenants and agrees to observe, and cause to be observed, all rules and regulations now established or which may hereafter be established by the Superintendent of the Military Academy at West Point so far as the same apply to or affect the leased premises.

No member of or delegate to Congress shall be admitted to any share or part of this contract or agreement or to any benefit which may arise thereupon.

It is hereby agreed by and between the parties hereto that the title to the building or buildings, to be erected under the terms of this lease, and the appurtenances and equipments therein (except such furniture and furnishings as may be supplied by guests for their own use) shall at all times during the life of this lease be in the party of the second part, his representatives or assigns; but that when said lease shall come to an end, either by the expiration of the term reserved herein, or by reason of the voiding of the same by the party of the first part and the cancellation or annullment thereof by the Secretary of War herein provided, the title to said building or buildings, and the appurtenances and equipments shall pass at once to the United States, subject to the provisions herein contained for the payment by the United
17 States of America to the party of the second part of just compensation therefor and the party of the first part shall

have the right without notice or demand to enter and take possession of said building or buildings, appurtenances and equipments without resort to any court proceedings, and to expel the party of the second part, his representatives and assigns.

It is mutually understood, covenanted and agreed that at the termination of this lease by the expiration of the term reserved, just compensation shall be made to the party of the second part, or his assigns, for the construction of said hotel appurtenances and equipments which may then be upon the demised premises.

It is further agreed and understood that this lease may be annulled at any time by the Secretary of War should the party of the second part fail to observe all of the covenants and conditions of the lease or any of the rules and regulations promulgated by the Superintendent under said lease. But it is mutually understood and agreed that before the party of the first part may terminate this lease by reason of any failure or omission on the part of the party of the second part, or his assigns, due notice shall be given him as well as any mortgagee or trustee of any mortgage covering the building, appurtenances and equipment upon the demised premises, of the claim made by the party of the first part of such omission or failure, and a reasonable opportunity afforded him to comply with the requirement of the party of the first part in that regard. And if such failure or omission shall continue after the lapse of a reasonable time given by the Superintendent to correct the same and to comply with the requirement of the said Superintendent in that regard, then the Secretary of War may in addition to other remedies the United States may have in the premises declare this lease forfeited for such failure, and thereupon just compensation shall be made to the party of the second part, or his assigns, for the construction of said hotel, appurtenances and equipments.

18 It is agreed that in case of the execution on the demised premises or any part thereof, of a mortgage, deed of trust, or other instrument affecting the title thereof, one certified copy thereof shall be filed with the Superintendent of the Military Academy and one certified copy with the Judge Advocate General of the Army.

That the party of the second part will keep said premises, the hotel, appurtenances and equipments in good repair at all times and that, at the expiration of said term or upon cancellation or annulment of the lease as herein provided, he will quit and surrender said property in as good state and condition as reasonable wear and tear thereof will permit; that the Superintendent, U. S. M. A., or an officer designated by him, shall at any and all times have access to said premises to make such inspections as he may deem necessary.

Should the United States Government during the term of this lease erect or permit the erection or operation of another hotel upon the United States Government reservation at West Point, after the expiration of the present lease of the hotel now on said reservation, then at the option of the party of the second part, this lease may be terminated, and the party of the second part shall thereupon become entitled to just compensation as above provided as of the date of such termination.

The party of the second part covenants and agrees that he will not sublet or lease the hotel, or any portion thereof, nor assign this lease except by way of concessions as above provided, without the written approval of the Superintendent of the Military Academy at West Point, except that it is understood and agreed that the party of the second part may form a corporation to which this lease may be assigned without such approval.

In witness whereof, the party of the first part has caused this instrument to be executed by John W. Weeks, Secretary of
19 War, and the seal of the War Department to be hereunto affixed, and the party of the second part has hereunto set his hand and seal the day and year first above mentioned.

UNITED STATES OF AMERICA,
[SEAL] By JOHN W. WEEKS,
Secretary of War.

HERBERT WILLIAMS.

UNITED STATES OF AMERICA,
District of Columbia, ss:

On this 17th day of October 1924, before me personally came Herbert Williams, to me known and known to me to be the person described in and who executed the foregoing lease and he duly acknowledged to me that he executed the same.

(Signed) W. T. HARTLESS,
Notary Public, Dist. of Columbia.

(Seal of Notary) (Seal of Court) No. 39280.

20 DISTRICT OF COLUMBIA, *ss:*

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, the same being a Court of Record, having by law a seal, do hereby certify that William T. Hartless before whom the annexed instrument in writing was executed, and whose name is subscribed thereto, was at the time of signing the same a Notary Public in and for said District, residing therein, duly commissioned and sworn, and authorized by the laws of said District to take the acknowledgment and proof of deeds or conveyances of lands, ten-

ements, or heriditaments, and other instruments in writing, to be recorded in said District, and to administer oaths; and that I am well acquainted with the handwriting of said Notary Public and verily believe that the signature to said instrument and impression of seal thereon are genuine.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Court, at the City of Washington, D. C., the 20th day of October A. D. 1924.

[SEAL OF COURT] (Signed) MORGAN H. BEACH;
Clerk.

By CHAS. B. COFLIN,
Asst. Clerk.

21 UNITED STATES OF AMERICA,
District of Columbia, ss:

On this 20th day of October 1924, before me personally came John W. Weeks, to me known and whom by me being duly sworn, did depose and say that he is the Secretary of War of the United States of America, the lessor in the foregoing lease; that he knows the seal of the War Department of the United States of America, and that the seal affixed to said instrument is such official seal of the said War Department and was affixed thereto by his order; that he signed his name as the Secretary of War of the United States of America and acknowledged to me that he executed the said lease as the act and deed of the United States of America under the authority and for the uses and purposes therein mentioned.

[NOTARY SEAL] (Signed) JNO. B. RANDOLPH,
Notary Public.

No. 39281. (Seal of Court.)
My Commission expires Oct. 22, 1925.

22 DISTRICT OF COLUMBIA, *ss:*

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, the same being a Court of Record, having by law a seal, do hereby certify that Jno. B. Randolph before whom the annexed instrument in writing was executed, and whose name is subscribed thereto, was at the time of signing the name a Notary Public in and for said District, residing therein, duly commissioned and sworn, and authorized by the laws of said District to take the acknowledgment and proof of deeds or conveyances of lands, tenements, or hereditaments, and other instruments in writing, to be recorded in said district, and to administer oaths; and that I am well acquainted with the handwriting of said Notary Public and

verily believe that the signature to said instrument and impression of seal thereon are genuine.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Court, at the City of Washington, D. C., the 20th day of October A. D. 1924.

[SEAL OF COURT] (Signed) MORGAN H. BEACH,
Clerk.

By CHAS. B. COFLIN,
Assistant Clerk.

23 *Exhibit B to petition*

93 EXCHANGE STREET,
Portland, Maine, January 5, 1943.

Attention of Corps of Engineers

Hon. HENRY L. STIMSON,
Secretary of War, Washington, D. C.

DEAR SIR:

Under the Act approved March 30, 1920 (41 Stat. 548), the Secretary of War, on October 17, 1924, leased a parcel of land on the United States Military Reservation at West Point for a period of fifty years for the purpose of constructing thereon a hotel and all other necessary buildings in accordance with plans to be approved by the Superintendent of the Military Academy. The assigns of the lessee constructed a hotel and necessary buildings known as the Thayer-West Point Hotel, which is owned and operated by the Thayer-West Point Hotel Company.

Due to existing conditions which are beyond the control of the stockholders and directors of The Thayer-West Point Hotel Company, and the military authorities at West Point, and which were not contemplated at the time the said lease was executed, it is now impossible to operate the Hotel as previously conducted. Such conditions will necessarily force a curtailment in operation unsatisfactory to the military authorities at West Point, and perhaps the closing of the Hotel in accordance with the terms of the lease. If the Hotel should fall into the hands of outside interests through the foreclosure of the first mortgage thereon, the bondholders would be deprived of any return on their original investment and the operation of the Hotel would be con-
24 ducted to the detriment of the Officers, the Cadets and their friends. Under the circumstances the Hotel Company considers it desirable that in order to avoid a curtailment of the operation or a possible closing down of the hotel, or the operation of the hotel to the detriment of the Officers, the Cadets

and others, the properties should be owned and operated by the Government.

The lease provides that it may be cancelled at any time by the Secretary of War should the second party thereto fail to observe all the covenants and conditions of the lease or any of the rules and regulations promulgated by the Superintendent under the said lease, and that the Secretary of War may declare the lease forfeited for such failure and thereupon just compensation shall be made to the second party to said lease or his assigns for the construction of the said Hotel, appurtenances and equipment.

Inasmuch as our holdings and the value thereof depend upon a contract, authorized by and embodied in the lease, it is suggested that the method of cancellation provided for in the lease, if adopted, will protect all parties, and we therefore suggest the following procedure, under the lease, which will result in the acquisition by the Government of the properties in question.

In order that the officers and directors of The Thayer-West Point Hotel Company may fully protect the rights of its stockholders and its bondholders, we are writing to you to inquire if you will write us a letter, stating that in the event default is made by the Company under the provisions of the lease, you will forthwith thereafter declare the lease forfeited and take title to the building erected on the leased property and the appurtenances and equipments therein (except such furniture and furnishings as are supplied by guests for their own use) in accordance with the provisions of the lease to the end that the Company shall be entitled to the just compensation, as provided in the lease. The letter should also indicate that the forfeiture will not result in any action by the Government other than to effect the conveyance of the Hotel property to the Government and to make just compensation therefor, as provided in the lease.

This action is to be based upon our delivery to the Superintendent at West Point of notice of the default in advance of the time when it will occur, and also upon our delivery to the Superintendent of a waiver by this Company and by the present holder of the mortgage on the Hotel of notice of any claim made by you of omission or failure growing out of such default, and a waiver of reasonable opportunity of compliance by the mortgagee to correct such omission or failure of the terms of the lease, and of a further waiver of any time to be given by the Superintendent of the West Point Academy to correct the omissions or failure caused by such default and to comply with any requirements of the Superintendent in that regard.

This communication is not intended and should not be construed as a notice of default on our part. However, it is urgently

requested that, with a view to relieving the acute situation which exists with respect to the maintenance and operation of the hotel, consideration be given to the possibility of Government ownership as contemplated by the terms and provisions of the lease.

Your early advice in this matter will be appreciated.

Yours truly,

THE THAYER-WEST POINT HOTEL COMPANY,
By Phillips M. Payson
PHILLIPS M. PAYSON, *President.*

26 *Exhibit C. to petition*

WAR DEPARTMENT,
Washington, Feb. 5, 1943.

THE THAYER-WEST POINT HOTEL COMPANY,
West Point, New York

GENTLEMEN: Receipt is acknowledged of your letter dated January 5, 1943, presenting the situation with respect to the maintenance and operation of the Thayer-West Point Hotel and appurtenances now owned by your Company and located on lands leased from the United States within the United States Military Reservation at West Point.

The lease entered into between your predecessors and the United States pursuant to an Act of Congress approved March 30, 1920 (41 Stat. 548), provides in substance that certain premises owned by the United States are leased for a period of fifty years commencing October 17, 1924, for the purpose of erecting thereon a hotel and other buildings necessary for its operation. The buildings thereon are the property of your Company and upon termination of the lease the buildings become the property of the United States, for which the United States is required to pay just compensation. The lease makes provision for annulment should the lessee fail to observe the covenants and conditions of the lease or the rules and regulations promulgated by the Superintendent of the Military Academy. Before termination of the lease by annulment, the lease provides that due notice must be given to the lessee, mortgagee and trustee of any mortgage, and a reasonable opportunity afforded to comply with the requirements of the United States.

27 Your letter indicates the necessity for a curtailment of the operation of the hotel by your Company or a possible closing of the hotel. In case of the closing of the hotel, it would be incumbent upon the Government to notify the lessee and other in-

terested parties that such action constitutes a failure to observe the covenants and conditions of the lease and would be a sufficient cause for annulment of the lease. Such notice would of necessity give reasonable opportunity to the parties to comply with the terms and conditions of the lease before an annulment would be effective. If, however, the Hotel Company should notify the War Department that it intended to close the hotel on a given date, and accompanied such notice with waivers from the Company, the mortgagee, trustee of any mortgage and other interested parties, relieving the lessor of the obligation of giving notice and granting a reasonable time for compliance with the terms and conditions of the lease, then it would be the duty of the War Department to take possession of the property upon the date specified.

The statute (41 Stat. 548) provides that upon termination of the lease just compensation must be paid to the owners of the property and it will be necessary for the Government to comply with the statute.

Please be informed, therefore, that if you proceed as you have tentatively outlined in your letter, and forward a notice of default accompanied by proper waivers from all interested parties, it is the intention of the War Department to take the necessary action to declare the lease forfeited under its terms, to take possession of the building and appurtenances, and to institute condemnation proceedings for the purpose of clearing the title to the buildings, appurtenances and equipment, and of determining the just compensation to be paid to the owners in accordance with the statute.

Sincerely yours,

HENRY L. STIMSON,
Secretary of War.

28 *Exhibit D (1) to petition*

FEBRUARY 26, 1943.

HON. HENRY L. STIMSON,
Secretary of War, Washington, D. C.

DEAR SIR: Please take notice that the undersigned intends to close The Thayer-West Point Hotel, located on the Military Reservation at West Point, New York, on March 10, 1943, at 9 o'clock, A. M., E. W. T. Reference is made to letters from the undersigned to the Secretary of War dated January 5, 1943, and from the Secretary of War to the undersigned dated February 5, 1943.

THE THAYER-WEST POINT HOTEL COMPANY,
By Phillips M. Payson,
PHILLIPS M. PAYSON, *President.*

29 *Exhibit D (2) to petition*

FEBRUARY 26, 1943.

MAJOR GENERAL FRANCIS B. WILBY,
Superintendent, United States Military Academy,
West Point, New York.

DEAR SIR: Please take notice that the undersigned intends to close The Thayer-West Point Hotel, located on the Military Reservation at West Point, New York, on March 10, 1943, at 9 o'clock, A. M., E. W. T. Reference is made to letters from the undersigned to the Secretary of War, dated January 5, 1943, and from the Secretary of War to the undersigned dated February 5, 1943.

THE THAYER-WEST POINT HOTEL COMPANY,
By: Phillips M. Payson,
PHILLIPS M. PAYSON, *President*

30 *Exhibit D (3) to petition*

Whereas The Thayer-West Point Hotel Company is now the owner of a lease dated October 17, 1924 made between the Secretary of War of the United States of America and Herbert Williams, covering certain premises on the United States Military Reservation at West Point, New York, upon which is erected the Hotel owned by the Thayer West Point Hotel Company known as The Thayer West Point Hotel, and

Whereas, said lease provides in part that before the Secretary of War may terminate the lease by reason of any failure or omission on the part of the said Herbert Williams or his assigns, due notice shall be given him as well as any mortgagee of any mortgage covering the buildings, appurtenances and equipments upon the demised premises of such failure or omission and a reasonable opportunity afforded him to comply with the requirements of the Secretary of War in that regard, and

Whereas, The Thayer West Point Hotel Company has received from Henry L. Stimson, Secretary of War of the United States, a letter dated February 5, 1943, stating the intention of the War Department in the event of the closing of the Hotel by The Thayer West Point Hotel Company, among other things, to take possession of said Hotel, and

Whereas, The Thayer West Point Hotel Company, relying upon said letter from the Secretary of War, intends to close the Hotel on March 10, 1943, at 9 o'clock A. M., Eastern War Time, and to notify the War Department and the Superintendent of the United States Military Academy at West Point of such intention, and

Whereas, said letter from the Secretary of War states that
31 if said notice shall be accompanied by proper waivers from all interested parties, relieving the lessor of the obligation

of giving notice and granting a reasonable time for compliance with the terms and conditions of the lease above set forth, then it would be the intention, among other things, of the War Department to take possession upon the date specified of the property covered by the lease, and

Whereas, the undersigned are the owners of a mortgage dated the 27th day of December 1930, made by The Thayer West Point Hotel Company to Phillips M. Payson, Harold C. Payson and T. M. Huston copartners engaged in business under the firm name of "H. M. Payson & Co.," all residing in the City of Portland, in the State of Maine, and covering the lease above mentioned and the buildings erected on the leased premises with the appurtenances thereto and equipment thereof on the United States Military Reservation at West Point, New York, owned by The Thayer West Point Hotel Company, said mortgage having been recorded in the County Clerk's Office in the County of Orange, State of New York, in Liber 641 of Mortgages, Page 8, which mortgage and the Bond secured by the same have been duly assigned to the undersigned and on which there is now due and unpaid the principal amount of $115,000 with interest thereon at the rate of 6% per annum from January 1, 1942.

Now, therefore, in consideration of the premises, the undersigned hereby waive notice of the closing of The Thayer West Point Hotel on March 10th, 1943 at 9 o'clock A. M., Eastern War Time, and of any claim made by the lessor in respect of such closing, and also waives reasonable opportunity to correct any failure or omission of the terms of said lease and to comply with the requirements of the Superintendent of the United States Military Academy at West Point in that regard, and hereby relieves
32 the Secretary of War of the United States of America from any obligation of giving such notice and of granting a reasonable time for the compliance with the terms and conditions of said lease.

Phillips M. Payson. [L. S.]
PHILLIPS M. PAYSON.
Harold C. Payson. [L. S.]
HAROLD C. PAYSON.

STATE OF MAINE.
County of Cumberland, ss:

On the 26th day of February 1943, before me came Phillips M. Payson and Harold C. Payson, to me known and known to me to be the individuals described in and who executed the foregoing instrument and acknowledged that they executed the same.

[SEAL] PORTER W. MOULTON,
Notary Public.

33 *Exhibit 9 (4) to petition*

Whereas, the undersigned is now the owner of a lease dated October 17, 1924, made between the Secretary of War of the United States of America and Herbert Williams, covering certain premises on the United States Military Reservation at West Point, New York, upon which is erected the Hotel owned by the undersigned known as The Thayer West Point Hotel, and

Whereas, said lease provides in part that before the Secretary of War may terminate the lease by reason of any failure or omission on the part of the said Herbert Williams or his assigns, due notice shall be given him of the claim made by the Secretary of War of such failure or omission and a reasonable opportunity afforded him to comply with the requirements of the Secretary of War in that regard, and

Whereas, the undersigned has received from Henry L. Stimson, Secretary of War of the United States a letter dated February 5th, 1943, stating the intention of the War Department in the event of the closing of the Hotel by the undersigned, among other things, to take possession of said Hotel, and

Whereas, the undersigned, relying upon said letter from the Secretary of War intends to close the Hotel on March 10th, 1943, at 9 o'clock A. M. Eastern War Time and to notify the War Department and the Superintendent of the United States Military Academy at West Point of such intention, and

Whereas, said letter from the Secretary of War states that if said notice shall be accompanied by proper waivers, from all interested parties relieving the lessor of the obligation of giving notice and granting a reasonable time for compliance with the terms and conditions of the lease above set forth, then it

34 would be the intention among other things of the War Department to take possession upon the date specified of the property covered by the lease.

Now, therefore, in consideration of the premises, the undersigned hereby waives notice of the closing of The Thayer West Point Hotel on March 10th, 1943, at 9 o'clock A. M. Eastern War Time and of any claim made by the lessor in respect of such closing, and also waives reasonable opportunity to correct any failure or omission of the terms of said lease and to comply with the requirements of the Superintendent of the United States Military Academy at West Point in that regard, and hereby relieves the Secretary of War of the United States of America from any obligation of giving such notice and of granting a reasonable time for the compliance with the terms and conditions of said lease.

[SEAL] THE THAYER WEST POINT HOTEL COMPANY,
By PHILLIPS M. PAYSON *President*.

Attest:

JOHN S. SHEDDEN, *Secretary*.

35 STATE OF MAINE,
County of Cumberland, ss:

On the 26th day of February 1943, before me came Phillips M. Payson to me known, who being by me duly sworn did depose and say: that he resides at Portland, Maine, that he is the President of The Thayer West Point Hotel Company, a corporation described in and which executed the foregoing instrument, that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[SEAL] PORTER W. MOULTON,
Notary Public.

37 *General Traverse*

Filed June 28, 1943

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

FRANCIS M. SHEA,
Assistant Attorney General.

DBM.
EEE.

Argument and submission of case

On December 4, 1945, the case was argued and submitted on merits by Mr. Ernest J. Ellenwood for the plaintiff; and Mr. D. B. MacGuineas for defendant.

39 *Special findings of fact, conclusion of law and opinion of the court by Whaley, Ch. J. Dissenting opinion by Whitaker, J.*

(Filed March 4, 1946)

Mr. Ernest J. Ellenwood for the plaintiff. Mr. John S. Shedden and Ellenwood & Shedden were on the briefs.

Mr. Donald B. MacGuineas, with whom was Mr. Assistant Attorney General John F. Sonnett, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following:

Special findings of fact

1. Plaintiff is and since November 7, 1930, has been a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in Wilmington, Delaware. The Thayer-West Point Hotel Corporation, hereinafter referred to as the "original corporation," was a corporation organized March 20, 1925, under the laws of the State of New York and existing at all times pertinent to this action. As a result of foreclosure sale and reorganization, plaintiff succeeded to the interest of the original corporation in the hotel building involved in this action.

2. The Act of Congress approved March 30, 1920, 41 Stat. 538, 548, provided:

"That the Secretary of War is hereby authorized to lease land on the United States Military Reservation at West Point, for a term of not exceeding fifty years, to any corporation, company, or individual, upon which to erect a hotel, and all other necessary buildings in connection therewith, in accordance with plans and specifications submitted to and recommended by the Superintendent of the Military Academy, and approved by the Secretary of War. Said lease shall contain such conditions, terms, reservations and covenants, as may be agreed upon and shall also provide for just compensation to the lessees for the construction of said hotel, appurtenances, and equipments, to be paid to said lessees at the termination of said lease."

3. October 17, 1924, the Secretary of War of the United States duly made, executed, and delivered to Herbert Williams of Newburgh, New York a lease of a certain tract of land within the boundaries of the United States Military Reservation at West Point, New York, for a term of fifty years, which reads in part:

"The said party of the second part [Williams] covenants that he will erect upon said premises a hotel and all other necessary buildings in connection therewith, substantially as set forth in the plans submitted by the party of the second part in connection with his bid to the Quartermaster of the Military Academy at West Point, complete plans and specifications to be hereafter submitted to, and approved in writing by, the Superintendent of the Military Academy at West Point and by the party of the first part.

* * * * * * *

"Provided further that said party of the second part shall keep the said hotel open for business every day during the continuance of this lease, except at such times as permission to close may be given in writing by the Superintendent, U. S. M. A.

* * * * * * *

"It is hereby agreed by and between the parties hereto that the

title to the building, or buildings, to be erected under the terms of this lease, and the appurtenances and equipments therein (except such furniture and furnishings as may be supplied by guests for their own use) shall at all times during the life of this lease be in the party of the second part, his representatives or assigns, but that when said lease shall come to an end, either by the expiration of the term reserved herein, or by reason of the voiding of the same by the party of the first part and the cancellation or annulment thereof by the Secretary of War herein provided, the title to said building, or buildings, and the appurtenances and
14 equipments shall pass at once to the United States, subject to the provisions herein contained for the payment by the United States of America to the party of the second part of just compensation therefor and the party of the first part shall have the right without notice or demand to enter and take possession of said building, or buildings, appurtenances and equipments without resort to any court proceedings, and to expel the party of the second part, his representatives and assigns.

"It is mutually understood, covenanted, and agreed that at the termination of this lease by the expiration of the term reserved, just compensation shall be made to the party of the second part, or his assigns, for the construction of said hotel appurtenances and equipments which may then be upon the demised premises.

"It is further agreed and understood that this lease may be annulled at any time by the Secretary of War should the party of the second part fail to observe all of the covenants and conditions of the lease or any of the rules and regulations promulgated by the Superintendent under said lease. But it is mutually understood and agreed that before the party of the first part may terminate this lease by reason of any failure or omission on the part of the party of the second part, or his assigns, due notice shall be given him as well as any mortgagee or trustee of any mortgage covering the building, appurtenances and equipment upon the demised premises, of the claim made by the party of the first part of such omission or failure, and a reasonable opportunity afforded him to comply with the requirement of the party of the first part in that regard. And if such failure or omission shall continue after the lapse of a reasonable time given by the Superintendent to correct the same and to comply with the requirement of the said superintendent in that regard, then the Secretary of War may in addition to other remedies the United States may have in the premises declare this lease forfeited for such failure, and thereupon just compensation shall be made to the party of the second part, or his assigns, for the construction of said hotel, appurtenances and equipments.

"That the party of the second part will keep said premises, the hotel, appurtenances and equipments in good repair at all times and that, at the expiration of said term or upon cancellation or annulment of the lease as herein provided, he will quit and
42 surrender said property in as good state and condition as reasonable wear and tear thereof will permit: that the Superintendent, U. S. M. A., or an officer designated by him, shall at any and all times have access to said premises to make such inspections as he may deem necessary."

Said lease, a true copy of which appears on pages 10–19 of the petition herein is hereby made part of these findings by reference.

4. March 24, 1925, Herbert Williams, duly executed and delivered to the original corporation an assignment of the lease.

5. Within the time required by the lease, the original corporation caused to be constructed and equipped, in accordance with the terms of the lease and the plans and specifications approved by the Superintendent of the Military Academy and by the Secretary of War, a hotel of fireproof construction, five and six stories high, containing approximately 225 guest rooms, three special suites, a lobby, a ballroom, a dining room, a grill room, a kitchen, and various services and facilities. The construction was commenced in April 1925, and completed in September 1926.

6. August 1, 1925, the original corporation made, executed, and delivered to the American Trust Company and Charles H. Trismen, as trustees, an indenture conveying to said trustees said lease and all the original corporation's right, title and interest therein, together with any building at any time placed on the land covered by the lease, personal property used therein, and all compensation to become due upon the termination of said lease, in trust as a first lien to secure payment of first mortgage and leasehold secured 6½ percent bonds in the aggregate principal amount of $1,000,000 issued by the original corporation. The proceeds of said bonds, less underwriters' fees and expenses, were used for the purpose of financing the construction of the hotel.

As of April 1, 1927, The Thayer-West Point Hotel Corporation entered into a second mortgage with the American Trust Co. as trustee, covering the same properties as were mortgaged under the first trust mortgage of August 1, 1925, in the principal amount of $500,000, subject to the first trust mortgage of August 1, 1925, and to the chattel mortgages referred to in Finding No. 15
43 herein, to secure an issue of General Mortgage & Leasehold Secured 7% Sinking Fund Gold bonds.

7. In June 1926, prior to completion, the original corporation took possession of the building and operated and managed the same under the terms of the lease.

8. The trustees mentioned in finding 6 commenced an action

in the Supreme Court of the State of New York, for the County of Orange, to foreclose the first mortgage described above and on or about January 17, 1929, a judgment was duly made, given and entered, decreeing the sale of the property described in the first mortgage. Said judgment, with a slight modification of the findings as to the amount of principal and interest due, was affirmed on appeal by the Appellate Division of the New York Supreme Court, Second Department, and became final.

9. On August 18, 1927, the original corporation was adjudicated a bankrupt in the United States District Court for the Southern District of New York. Due to the first lien and foreclosure proceedings, the property here involved was not administered by the trustee in bankruptcy, and no dividend was ever paid in the bankruptcy proceedings to any creditor of the original corporation, because of lack of available assets.

10. July 8, 1930, pursuant to said judgment, the lease and leasehold estate and all the properties and appurtenances and the interest therein, described in the first mortgage, except furniture and equipment covered by a chattel mortgage hereinafter set forth, were offered for sale at a public foreclosure sale and were bid in by a bondholders' committee, acting in behalf of certain of the holders of the first mortgage bonds. The price for which the property sold was $25,000, and subsequently a deficiency judgment of $1,235,067.67, was entered in the proceedings against the original corporation.

11. The purchase by the bondholders' committee was pursuant to a plan of reorganization, the principal features of which were: (1) the committee would organize a new corporation; (2) the committee would assign to the new corporation all the rights purchased by it at the foreclosure sale and all equipment which it might acquire by purchase or otherwise; (3) the new corporation would issue income bonds and would issue common stock,
44 the bondholders of the original corporation who would join in the plan would surrender their bonds and would receive $50 face value of the bonds of the new company for each $100 face value of surrendered bonds in the original corporation and would receive in addition shares of common stock in proportion to the amount of bonds surrendered; (4) the new company would mortgage the property for not to exceed $150,000 to procure working capital and to pay expenses of the reorganization, including the price paid by the committee at the foreclosure sale.

12. The reorganization was accomplished as planned. The plaintiff corporation was organized and to it the bondholders' committee assigned the interest acquired at the foreclosure sale. First mortgage bondholders of the original corporation surrendered bonds to the extent of $879,400 face value out of the

$1,000,000 issued. In exchange, such first mortgage bondholders received $439,700 face value of bonds issued by the plaintiff corporation and 8,794 shares of no-par value stock, constituting all the issued and outstanding shares of stock in the plaintiff corporation. Such bonds and common stock are presently outstanding.

December 27, 1930, plaintiff corporation made, executed, and delivered its bond for the sum of $125,000, secured by a first mortgage on the leasehold estate and other hotel property, which bond and mortgage are presently outstanding in the principal amount of $115,000, with unpaid interest at 6 percent per annum from January 1, 1942.

The holders of the $120,600 face value of the first mortgage bonds in the original corporation who did not join in the plan of reorganization received their proportionate distributive share of the proceeds of $25,000 paid at the foreclosure sale.

13. December 26, 1930, the referee appointed by the Court for the sale of the property under the decree of foreclosure above mentioned, duly made, executed, and delivered to plaintiff corporation his deed by which he granted and conveyed to plaintiff corporation the lease and leasehold estate here involved and all property covered by said sale. In the same month the trustee in bankruptcy of the original corporation, the trustees under the second mortgage on the property here involved and trustees of the
45 first mortgage made, executed, and delivered to plaintiff corporation their several deeds by which they remised, released and quit-claimed to the plaintiff corporation and interest which they might have in the property covered by said foreclosure sale.

14. December 22, 1930, the Superintendent of the United States Military Academy made, executed, and delivered to the plaintiff corporation his written approval of the assignment of the lease.

15. The furniture, furnishings, carpeting, rugs, linens, china, glassware, kitchen utensils and kitchen equipment in the hotel had been sold to the original corporation on or about May 21, 1926, by L. Barth & Company, Inc. The original corporation gave to the seller certain notes secured by chattel mortgages upon said personal property in part payment of the purchase price. The original corporation having defaulted in payment of the notes, the Barth company foreclosed the chattel mortgages, but left the furniture and other equipment in the possession of the receivers in the foreclosure proceedings first above-mentioned under an agreement by which the receivers paid a monthly rental to the Barth company. After the plaintiff took possession of the hotel, it continued the use of such furniture and other equipment under a rental agreement with the Barth company until February 19, 1931, when plaintiff purchased the furniture and other equipment from the Barth company.

16. Under and by virtue of the transactions hereinbefore described, plaintiff took possession of the hotel and all property here involved on January 1, 1931, and, until March 10, 1943, operated and managed the same under the terms of the lease here involved and with the knowledge and consent of the Superintendent of the United States Military Academy at West Point.

17. January 5, 1943, plaintiff sent a letter to the Secretary of War which reads in part:

"Due to existing conditions which are beyond the control of the stockholders and directors of The Thayer-West Point Hotel Company, and the military authorities at West Point, and which were not contemplated at the time the said lease was executed, it is now impossible to operate the Hotel as previously conducted. Such conditions will necessarily force a curtail-
46 tailment in operation unsatisfactory to the military authorities at West Point, and perhaps the closing of the Hotel in accordance with the terms of the lease. If the Hotel should fall into the hands of outside interests through the foreclosure of the first mortgage thereon, the bondholders would be deprived of any return on their original investment and the operation of the Hotel would be conducted to the detriment of the Officers, the Cadets and their friends. Under the circumstances the Hotel Company considers it desirable that in order to avoid a curtailment of the operation or a possible closing down of the hotel, or the operation of the hotel to the detriment of the Officers, the Cadets and others, the properties should be owned and operated by the Government.

"The lease provides that it may be cancelled at any time by the Secretary of War should the second party thereto fail to observe all the covenants and conditions of the lease or any of the rules and regulations promulgated by the Superintendent under the said lease, and that the Secretary of War may declare the lease forfeited for such failure and thereupon just compensation shall be made to the second party of said lease or his assigns for the construction of the said Hotel, appurtenances and equipment.

"Inasmuch as our holdings and the value thereof depend upon a contract, authorized by and embodied in the lease, it is suggested that the method of cancellation provided for in the lease, if adopted, will protect all parties, and we therefore suggest the following precedure, under the lease, which will result in the acquisition by the Government of the properties in question:

"In order that the officers and directors of The Thayer-West Point Hotel Company may fully protect the rights of its stockholders and its bondholders, we are writing to you to inquire if you will write us a letter, stating that in the event default is made by the Company under the provisions of the lease, you will forthwith thereafter declare the lease forfeited and take title to the

building erected on the leased property and the appurtenances and equipments therein (except such furniture and furnishings as are supplied by guests for their own use) in accordance with the provisions of the lease to the end that the Company shall be entitled to the just compensation, as provided in the lease. The letter should also indicate that the forfeiture will not result in any action by the Government other than to effect the conveyance of the Hotel property to the Government and to make just compensation therefor, as provided in the lease.

47 "This action is to be based upon our delivery to the Superintendent at West Point of notice of the default in advance of the time when it will occur, and also upon our delivery to the Superintendent of a waiver by this Company and by the present holder of the mortgage on the hotel of notice of any claim made by you of omission or failure out of such default, and a waiver of reasonable opportunity of compliance by the mortgagee to correct such omission or failure of the terms of the lease, and of a further waiver of any time to be given by the Superintendent of the West Point Academy to correct the omissions or failure caused by such default and to comply with any requirements of the Superintendent in that regard.

"This communication is not intended and should not be construed as a notice of default on our part. However, it is urgently requested that, with a view to relieving the acute situation which exists with respect to the maintenance and operation of the hotel, consideration be given to the possibility of Government ownership as contemplated by the terms and provisions of the lease.

"Your early advice in this matter will be appreciated."

48. February 5, 1943, the Secretary of War sent a letter to plaintiff, which reads in part:

"Your letter indicates the necessity for a curtailment of the operation of the hotel by your Company or a possible closing of the hotel. In case of the closing of the hotel, it would be incumbent upon the Government to notify the lessee and other interested parties that such action constitutes a failure to observe the covenants and conditions of the lease and would be a sufficient cause for annulment of the lease. Such notice would of necessity give reasonable opportunity to the parties to comply with the terms and conditions of the lease before an annulment would be effective. If, however, the Hotel Company should notify the War Department that it intended to close the hotel on a given date, and accompanied such notice with waivers from the Company, the mortgagee, trustee of any mortgage and other interested parties, relieving the lessor of the obligation of giving notice and granting a reasonable time for compliance with the terms and conditions of the lease, then it would be the duty of the War Department to take possession of the property upon the date specified.

"The statute (41 Stat. 548) provides that upon termina-
48 tion of the lease just compensation must be paid to the owners of the property and it will be necessary for the Government to comply with the statute.

"Please be informed, therefore, that if you proceed as you have tentatively outlined in your letter, and forward a notice of default accompanied by proper waivers from all interested parties, it is the intention of the War Department to take the necessary action to declare the lease forfeited under its terms, to take possession of the building and appurtenances, and to institute condemnation proceedings for the purpose of clearing the title to the buildings, appurtenances and equipment, and of determining the just compensation to be paid to the owners in accordance with the statute.

19. February 26, 1943, plaintiff sent identical notices to the Secretary of War and to the Superintendent of the United States Military Academy at West Point which read:

"Please take notice that the undersigned intends to close The Thayer-West Point Hotel, located on the Military Reservation at West Point, New York, on March 10, 1943, at 9 o'clock, A. M., E. W. T. Reference is made to letters from the undersigned to the Secretary of War, dated January 5, 1943, and from the Secretary of War to the undersigned dated February 5, 1943."

March 10, 1943, pursuant to the arrangement as provided in the letters mentioned in Findings 17 and 18, the plaintiff discontinued operation of the said hotel and its properties, appurtenances and equipment, and closed the said hotel at 9 o'clock A. M. Eastern War Time on said day and immediately thereupon the Secretary of War for and in behalf of the defendant, acting through his agents and representatives, and pursuant to the provisions of the lease, took over possession and occupation and management of the said hotel and all its properties, appurtenances, and equipment, and has ever since continued in possession, management, operation, and control of the same.

20. March 24, 1943, the Secretary of War caused to be served on the plaintiff a written notice which recited facts and circumstances leading to the making of the lease and the plaintiff's interest therein and stated in part:

"Whereas, under said lease it is provided that the lessee 'shall keep the said hotel open for business every day during the
49 continuance of this lease, except at such times as permission to close may be given in writing by the Superintendent, U. S. M. A. * * *' and

"Whereas, the said lease provides that it may be annulled at any time by the Secretary of War should the lessee fail to observe all of the covenants and conditions set forth therein; that prior to such termination by annulment of the said lease by reason of

such failure or omission on the part of said lessee, due notice shall be given to said lessee and to any mortgagee or trustee of any mortgage covering the buildings, appurtenances, and equipment in or upon the said premises, the said lessee shall be given a reasonable opportunity to correct any failure or supply any omission in the matter of compliance with the covenants and conditions of said lease, and

"Whereas, the Thayer-West Point Hotel Company, a Delaware corporation, lessee, ceased operation of the hotel on March 10, 1943, at 9:00 a. m. E. W. T., and

"Whereas, the lessee and the mortgagee have by instruments dated February 26, 1943, waived the notice of failures or omissions and the reasonable opportunity for compliance.

"Now, therefore, I, Henry L. Stimson, Secretary of War of the United States of America, acting by and on behalf of the United States, as authorized by law and in accordance with the terms and conditions of the aforesaid lease, do hereby annul said lease effective upon date of delivery of this instrument."

21. April 19, 1943, plaintiff sent a letter to the Secretary of War calling attention to the terms of the lease and stating that plaintiff had become entitled to just compensation for the construction costs of the hotel, appurtenances, and equipment. Plaintiff requested an opportunity to discuss the amount and added: "for the purposes of discussion only, we fix the tentative amount of our claim to be approximately $2,300,000.00."

May 21 defendant replied to this letter in part as follows:

"It appears to this office that the tentative amount of $2,300,000, fixed by you for settlement, is far in excess of the reasonable value, and therefore it appears necessary to have the just compensation determined by the court.

22. May 20, 1943, the day after the petition in the case at bar was filed, defendant filed a petition in the District Court
50 of the United States in and for the Southern District of New York for the condemnation of the property here involved. February 7, 1944, an order was made in said action staying all further proceedings therein, pending the final determination of this case in the Court of Claims.

23. The fair and reasonable cost to the original corporation of constructing the hotel building and appurtenances was approximately $1,300,000.00. The books of original entry covering the cost were destroyed on or about February 25, 1938, by the attorneys for the trustee in bankruptcy.

24. The original corporation purchased most of the original furniture and equipment for the hotel from L. Barth & Company, Inc., at the contact price of $296,743.03, and paid $35,000 at the time of the purchase. It gave notes secured by chattel mortgages

for the remainder and paid $17,000 on the deferred balance, making a total of $52,000 paid by the original corporation on the purchase price. In 1930, L. Barth & Company, Inc., foreclosed the chattel mortgages, but left the furniture and equipment in the possession of the original corporation, under an agreement by which the original corporation paid rental to L. Barth & Company, Inc., for the use of the furniture and equipment. After plaintiff acquired the hotel, it took possession of the furniture and equipment under a similar agreement, and paid rental to L. Barth & Company, Inc., for its use until February 19, 1931, when plaintiff purchased the furniture and equipment from L. Barth & Company, Inc., and paid them the sum of $35,000 therefor.

25. As of March 10, 1943, there was no market for the hotel and no market value thereof can be determined. The cost of reproducing the building as of that date would have been $1,138,160, not including the cost of landscaping, or any allowance for interest during construction or charges for financing.

26. The effect of war conditions on the market for furniture and equipment of the character here involved makes it difficult to fix a value as of March 10, 1943. New furniture and equipment of the same kind and character would have cost, as of March 10, 1943, from 10 percent to 20 percent more than the furniture and equipment cost in 1926, when most of it was purchased, that
51 is, the cost in 1943 would have been from $325,000 to $355,000. The furniture and equipment was almost seventeen years old in 1943 and in hotel practice, such furniture and equipment is considered to depreciate 100 percent in four to twelve years. It was worn, some of it was in need of repairs and repainting, and a portion of it was not usable at all. It was not, however, depreciated 100 percent in fact, and it was not useless, except in particular instances. On the contrary, prior to March 10, 1943, most of it was being used daily by plaintiff in the business of the hotel, and was continued to be used by the defendant after that date. Defendant expended for repairs and replacements an amount equal to approximately eight percent of the amount new equipment of the same kind and character would have cost at that time. After such repairs and replacements, the furniture and equipment was maintained and used by the defendant for the business of the hotel and the accommodation of its guests, who were composed principally of the personnel at the Military Academy, their relatives and friends, and other persons whose presence was occasioned by matters connected with the Military Academy.

27. Taking into consideration all relevant facts and circumstances, including the approximate cost of original construction, the cost of reproduction as of March 10, 1943, less depreciation, the fair and reasonable value of the hotel and appurtenances as

of March 10, 1943, the date possession of it was taken by the defendant, was $820,682.00.

Taking into consideration all relevant facts and circumstances, including items of original cost with depreciation, physical condition and the market for second-hand furniture on March 10, 1943, and usefulness, the fair and reasonable value of the equipment, including furniture and kitchen equipment, on March 10, 1943, was $47,000.00.

The total of these two values is $867,682.00, and this is fair and reasonable compensation to the plaintiff as of March 10, 1943, for construction of the hotel, appurtenances, and equipments. The addition thereto of four percent per annum thereon from March 10, 1943, until the date of payment, raises the aggregate value of $867,682.00, so ascertained and determined, to just compensation as of the date of payment.

52 *Conclusion of law*

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a matter of law, that the plaintiff is entitled to recover $867,682.00 with interest.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of eight hundred sixty-seven thousand six hundred and eighty-two dollars ($867,682.00), with interest at four percent per annum from March 10, 1943, to the date of payment, not as interest but as a part of just compensation.

Opinion

WHALEY, Chief Justice, delivered the opinion of the court:

Plaintiff, The Thayer-West Point Hotel Company, brings this suit against the defendant under the provision in a lease for just compensation to the lessee, or its assigns, for the construction of a hotel, its appurtenances and equipments, on the United States Military Reservation at West Point, State of New York.

The lease was entered into pursuant to an Act of Congress approved March 30, 1920, 41 Stat. 538, 548, reading as follows:

"That the Secretary of War is hereby authorized to lease land on the United States Military Reservation at West Point for a term of not exceeding fifty years, to any corporation, company, or individual, upon which to erect a hotel, and all other necessary buildings in connection therewith, in accordance with plans and specifications submitted to and recommended by the Superintendent of the Military Academy, and approved by the Secretary of War. Said lease shall contain such conditions, terms, reservations

and covenants, as may be agreed upon and shall also provide for just compensation to the lessees for the construction of said hotel, appurtenances, and equipments, to be paid to said lessees at the termination of said lease."

The plaintiff lays claim to "the total cost for the construction of the hotel, including appurtenances and equipment, together with all expenses properly attributable thereto," in the sum of approximately $1,932,000.00.

53 Pursuant to the Act of March 30, 1920, the Secretary of War leased to Herbert Williams October 17, 1924 a tract of land within the military reservation, consonant with the expressed purpose of the Act. Certain provisions of this lease have a more or less direct bearing upon the claim here made by the plaintiff.

The lessee covenanted to build upon the reservation a hotel substantially in accordance with Government plans, and to keep it open continuously except at specially permitted times, title to the hotel to be in the lessee until termination of the lease when it should pass forthwith to the Government. Upon failure of the lessee to observe the covenants of the lease, the Secretary of War might annul the lease, and, as the lease worded it,

"thereupon just compensation shall be made to the party of the second part [lessee], or his assigns, for the construction of said hotel, appurtenances and equipments."

The lessee was not given free rein as to return on his investment. The lease provided that the lessee

"shall, from time to time, establish standard rates for rooms and meals in said hotel, which rates shall be subject to the approval of the Superintendent of the Military Academy for the time being, and the following persons shall be entitled to a discount from said rates of twenty-five percent (25%) upon production of a card signed by the Adjutant of the Post or such other officer as may be designated by the Superintendent representing the bearer to be entitled thereto as follows;

"(a) The Board of Visitors to the United States Military Academy and officers of the United States Government making tours of inspection at the Post.

"(b) Parents and guardians of cadets.

"(c) Officers of the United States Army on duty at the Post and their dependents when other quarters are not available.

"(d) Officers and their dependents not under War Department orders for such duty, but officially connected with athletic teams as coaches or trainers. There shall be no discrimination in the quality of service, meals or otherwise, against these classes as compared with other guests.

"The total number of rooms in said hotel which shall be subject to such discount shall not at any one time exceed one hundred rooms.

54 As finally constructed, the hotel had approximately 225 guest rooms.

The lessee, being the party of the second part, further covenanted as follows:

"That the party of the second part will keep said premises, the hotel, appurtenances and equipments in good repair at all times and that, at the expiration of said term or upon cancellation or annulment of the lease as herein provided, he will quit and surrender said property in as good state and condition as reasonable wear and tear thereof will permit; * * *."

Herbert Williams, being permitted to do so by the terms of the lease, formed a corporation, The Thayer-West Point Hotel Corporation, and on March 24, 1925, assigned the lease thereto. This corporation constructed the hotel.

The corporation issued first mortgage bonds in the principal sum of $1,000,000 secured by a trust deed to the American Trust Company and Charles H. Trismen, as trustees, conveying the lease and prospective building in trust. Proceeds of the bond issue were used to finance construction of the hotel. A second trust mortgage was entered into by the corporation on or about April 1, 1927, with the American Trust Company, covering the same properties, in the principal amount of $500,000.00.

The corporation operated the hotel for a time but in August of 1927 went into bankruptcy. The property, however, was not administered by the trustee in bankruptcy due to foreclosure proceedings instituted by the trustees, American Trust Company and Charles H. Trismen, wherein judgment was rendered and a sale decreed.

A committee was formed, representing certain of the bondholders, which bid in the property at the foreclosure sale, at $25,000, and a deficiency judgment was entered against the defaulting corporation in the sum of $1,235,067.67.

The bondholders' committee formed a new corporation, The Thayer-West Point Hotel Company, the plaintiff herein, according to a plan by which the committee assigned to the plaintiff its purchased rights and equipment, and the plaintiff issued income bonds and common stock. The bondholders of the original corporation,

participating in the plan, exchanged their bonds at $100

55 face value of surrendered bonds to $50 face value of the new bonds, receiving in addition shares of common stock in proportion to the amount of bonds surrendered.

The holders of the first mortgage bonds of the original corporation who did not join in the plan of reorganization, holding $120,-

000 face value, received their proportionate distributive share of the proceeds of the $25,000 paid at the foreclosure sale.

Out of the original bond issue of $1,000,000 by the old corporation, bonds to the extent of $879,400 face value were surrendered in return for $439,700 face value of the new bonds and 8,794 shares of no-par-value common stock.

These new bonds and the common stock are now outstanding.

In addition the plaintiff on December 27, 1930, issued its bond in the sum of $125,000, secured by first mortgage on the hotel property and leasehold, which is now outstanding in the principal amount of $115,000 with unpaid interest at six percent per annum from January 1, 1942.

In December of 1930, the referee in the foreclosure proceedings, the trustee in bankruptcy, the trustees of the first mortgage and of the second mortgage of the original corporation conveyed to the plaintiff all their several interests in the hotel and leasehold, and the Superintendent of the Academy gave his written approval of assignment of the lease to plaintiff.

This was the situation with respect to ownership of the hotel at the end of 1930. The original corporation had outfitted the hotel at some expense about May 21, 1926, giving to the vendor of the furniture and equipment notes secured by chattel mortgage. The original corporation defaulted on the notes, the chattel mortgage was foreclosed, but the mortgagee left the furniture and equipment in the hotel under a rental agreement. This rental agreement was continued with the plaintiff when the plaintiff took possession at the beginning of 1931, but the plaintiff purchased the furniture and equipment outright February 19, 1931.

Beginning January 1, 1931, and ending March 10, 1943, the plaintiff operated the hotel under the terms of the lease.

Correspondence, beginning January 5, 1943, and ending
56 May 21, 1943, is described in the findings. It appears thereby that the plaintiff ceased operation of the hotel March 10, 1943, that the defendant annulled the lease and took over the property, certain stipulations as to notice, etc., being waived.

Suit is now here to recover compensation for the construction of the hotel, its appurtenances and equipment.

The lease provided that, under the circumstances here described, "just compensation shall [thereupon] be made to the party of the second part [lessee], or his assigns, for the construction of said hotel, appurtenances and equipments."

This lease was entered into October 17, 1924; the hotel was completed in September 1926.

The statute under which the lease was made provided that just compensation should be paid at the termination of the lease.

The original construction costs were not made a matter of record between the parties, as one might suppose would have been done if original cost was to be the basis of just compensation. The original books of entry, showing construction costs have been destroyed. The original corporation came into existence solely for the purpose of carrying into effect the terms of the lease; its whole existence was bound up in the lease. It appears to have had no other business than that contemplated by the lease. The lease was its lifeblood.

The testimony is to the effect that the books of account were destroyed by the attorneys for the trustee in bankruptcy, who, curiously enough, did not, because the foreclosure proceedings, administer the property at all. The books were destroyed February 25, 1938, while the plaintiff was operating the hotel. The excuse is that the rules of the bankruptcy court permitted such destruction, but that is not saying it had to be done.

The evidence surviving as to actual original costs is in general too fragmentary, indefinite, and otherwise unreliable to warrant definite findings with regard thereto. The amounts found are therefore approximate only.

57 There are other sources which may be made use of in fixing upon just compensation. "Just compensation" has definition that relates it to a taking. Here there was no taking in the legal sense. The contract provided that title and possession should pass from lessee to lessor immediately upon termination of the lease. Title did pass, and an agreed entry was made. The plaintiff ceased operation March 10, 1943. Although there was no "taking," the parties use this date for the purpose of offering values other than those at time of original construction of the hotel, and we use it as the date of the "taking" for fixing "just compensation."

There was no market to which resort might be had for adjudging value of the hotel building. The plaintiff owned the building, the Government owned the land on which the building rested, and the building formed part of the realty. Assuming that market value could be determined for the realty (it was a Government military reservation), there would be the problem of dividing such value between building and land.

The Act of Congress says that the lease shall provide for just compensation, to be paid at termination. The amount of just compensation was not fixed by the lease. Instead, the lease simply provided, without following the wording of the statute, that just compensation should be made and left the amount to be determined at a future time.

But neither in the Act nor in the lease is there any provision for just compensation for a taking. The compensation is to be for construction of the hotel. Cost is not mentioned.

There was perhaps good reason for not specifying the amount of just compensation in the original lease. The cost of construction had not been determined, if cost were to be a fact or in arriving at just compensation. And if the original cost were to be recovered upon termination, there would be no need for the lessee, in fixing upon the charges to its guests, to provide for return of the original investment in addition to earnings on investment. Assurance that it would get back the original investment would take care of the question of retirement. Whether this situation,
58 or some other situation, was considered by the Government in approving hotel rates, is a matter left in complete darkness. The fact that the lessee was paying no ground rent might also have influenced hotel rates.

Under these circumstances it seems apparent that just compensation was not to be necessarily original cost, and, as indicated, there appears to have been at no time an account stated between the parties covering original cost.

Just compensation therefore for the construction of this hotel is not subject to any nice calculation.

What amount constituted just compensation to the plaintiff March 10, 1943, for construction of the hotel and appurtenances? We have found it to be $820,682.00. In arriving at this amount there has been taken into consideration the history and circumstances recited in the findings of fact. The main reliance has been upon sound value, that is, reconstruction new less depreciation, bringing the hotel building and appurtenances to the condition they were in when transferred to Government title and possession March 10, 1943. This takes care of depreciation in excess of that due to reasonable wear and tear.

There was a market for the hotel equipment. The application of so-called "sound" value to the equipment need not be resorted to. On the basis of all the facts relevant thereto, recited in the findings, just compensation for the equipment as of March 10, 1943, is found to be $47,000.00.

The total of just compensation to the plaintiff for construction of the hotel, its appurtenances, and equipments, is therefore $867,682.00, as of March 10, 1943.

There remains the question of additional allowance to make compensation a just one as of the date of payment.

The suit here is on a contract and not for compensation under the Fifth Amendment. Section 177 of the Judicial Code prohibits this Court from allowing interest "unless upon a contract expressly stipulating for the payment of interest." But the Supreme Court has held that interest, so-called, necessary to build compensation up to a point where it can be con-
59 sidered just as of the date of payment, is not interest within

the meaning of Section 177 of the Judicial Code. Phelps v. United States, 274 U. S. 341, 344.

Both statute and contract expressly provide for the payment of "just compensation." The compensation payable must be no less just than that payable under the Fifth Amendment. There is no plausible distinction.

The rate of four percent per annum from March 10, 1943, down to the date of payment, will be applied to and added to the sum of $867,682.00 and included in the judgment herein.

The plaintiff is entitled to recover accordingly, and it is so ordered.

JONES, Judge; and LITTLETON, Judge, concur.

WHITAKER, Judge, dissenting:

I dissent. I think $500,000.00 would be liberal compensation.

MADDEN, Judge, took no part in the decision of this case.

61 *Judgment*

At a Court of Claims held in the City of Washington on the 4th day of March A. D., 1946, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a matter of law, that the plaintiff is entitled to recover $867,682.00 with interest.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of eight hundred sixty-seven thousand six hundred and eighty-two dollars ($867,682.00) with interest at four percent per annum from March 10, 1943, to the date of payment, not as interest but as a part of just compensation.

63 [Clerk's certificate to foregoing transcript omitted in printing.]

(Endorsement on cover:) File No. 50935. Court of Claims. Term No. 1232. The United States, Petitioner, v. The Thayer-West Point Hotel Company. Petition for a writ of certiorari and exhibit thereto. Filed May 15, 1946. Term No. 1232 O. T., 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1946

Supreme Court of the United States

Order allowing certiorari

Filed October 14, 1946

The petition herein for a writ of certiorari to the Court of Claims is granted and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1946

No. 1232

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES, PETITIONER

v.

THE THAYER-WEST POINT HOTEL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1232

UNITED STATES, PETITIONER

v.

THE THAYER-WEST POINT HOTEL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above-entitled case on March 4, 1946.

OPINION BELOW

The opinion of the Court of Claims (R. 32–38) has not been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 4, 1946 (R. 38). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended, 28 U. S. C. 288 (b).

QUESTION PRESENTED

Whether Congressional use of the phrase "just compensation", in a statute authorizing a lease of Government land for the construction of a hotel and payment to the lessee at the termination of the lease for buildings constructed by him upon the land, empowered the Court of Claims to include in its judgment interest from the date of the agreed termination of the lease despite the provisions of Section 177 (a) of the Judicial Code.

STATUTES INVOLVED

1. The Military Academy Appropriation Act, 1921 (Act of March 30, 1920, 41 Stat. 538, 548), provides:

> That the Secretary of War is hereby authorized to lease land on the United States Military Reservation at West Point, for a term of not exceeding fifty years, to any corporation, company, or individual, upon which to erect a hotel, and all other necessary buildings in connection therewith, in accordance with plans and specifications submitted to and recommended by the Superintendent of the Military Academy, and approved by the Secretary of War. Said lease shall contain such conditions, terms, reservations and covenants, as may be agreed upon and shall also provide for just compensation to the lessees for the construction of said hotel, appurtenances, and equipments, to be paid to said lessees at the termination of said lease.

2. The pertinent part of Section 177 (a) of the Judicial Code, 28 U. S. C. 284, provides:

> (a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, * * *.

STATEMENT

Pursuant to authorization contained in the Act of March 30, 1920, *supra,* the Secretary of War on October 17, 1924, leased a tract of land within the West Point Military Reservation to one Herbert Williams for the purpose of having a hotel constructed and operated on the land thus leased. The lease was for a term of 50 years from October 17, 1924, and was made in consideration of one dollar (R. 6, 22). Williams agreed to erect a hotel and all other necessary buildings in connection therewith, in accordance with plans which he had submitted with his bid for the lease, and subject to approval of final plans and specifications by the Superintendent of the Military Academy and by the Secretary of War (R. 22). The lease provided that the title to such buildings should remain in the lessee until the expiration of the term or until cancellation by the Secretary of War in the manner provided in the lease, and that, on such termination, title to the buildings should pass at once to the United States subject to the provisions for the payment of just compensation by the United

States (R. 22–23). The lease further provided that just compensation would be made to Williams, on termination, for the "* * * construction of said hotel appurtenances and equipments which may then be upon the demised premises." (R. 23).[1] Williams' main undertakings were to begin construction within six months and to complete the hotel within two years thereafter (R. 6); to furnish protective bonds against liens (R. 7); to establish approved standard rates for rooms and meals, with certain discounts to specified classes of persons (R. 7); to provide fire, liability and compensation insurance (R. 8); to restore or repair buildings damaged by fire (R. 8); and to operate the hotel at all times during the continuance of the lease. (R. 8–9).

In addition to the lease of land to Williams for one dollar ground rent with "just compensation" at termination, the Secretary of War agreed to furnish the hotel with electricity for light and power at the same price paid by the Quartermaster Department to the Military Academy (R. 9); to furnish the hotel water supply at cost (R. 9–10); to permit the hotel to obtain surplus ice from ponds on the Military Reservation (R. 9); and to allow the hotel to utilize the Academy

[1] The Act of March 30, 1920, *supra*, provided for just compensation to the lessee for "* * * the construction of said hotel, appurtenances, and equipments, to be paid to said lessees at the termination of said lease." (R. 22).

sewerage system without charge (R. 10). Other minor concessions were made (R. 9–10).

Williams assigned the lease to the Thayer-West Point Hotel Corporation, a corporation organized under the laws of New York on March 20, 1925, which constructed and completed a hotel within the time required by the lease (R. 24, 22). Prior to the completion of construction, on August 1, 1925, the corporation conveyed the lease and the corporation's interest therein, together with the corporation's right, title or interest to any building placed on the land covered by the lease, personal property used therein, and all compensation to become due upon the termination of the lease, to trustees under an indenture which secured bonds in the aggregate amount of one million dollars issued by the corporation to finance construction (R. 24).[2]

The corporation took possession of the hotel buildings in June, 1925, prior to completion, and operated the hotel thereafter under the terms of the lease until approximately January 17, 1929 (R. 24–25). On August 8, 1927, the corporation was adjudicated a bankrupt in the United States District Court for the Southern District of New York (R. 25) and, in a foreclosure action brought by the first mortgage trustees in the New York Su-

[2] On April 1, 1927, the corporation entered into a second mortgage arrangement to secure a $500,000 issue of bonds (R. 24).

preme Court, a judgment was entered on January 17, 1929, which ordered the sale of the property described in the first mortgage (R. 25).[3] The leasehold estate and other properties covered by the first mortgage were sold on July 8, 1930, at a public foreclosure sale to a committee acting on behalf of certain holders of the corporation's mortgage bonds (R. 25). The sale price was $25,000 and a deficiency judgment of $1,235,067.67 was entered against the corporation (R. 25). The bondholders' committee, pursuant to a plan of reorganization, assigned the interest acquired at the foreclosure sale to the respondent herein, The Thayer-West Point Hotel Company, a corporation organized under the laws of Delaware on November 7, 1930 (R. 22, 25–26). First mortgage bondholders of the original corporation surrendered bonds to the extent of $879,400 face value of the one million dollars issued, and received, in exchange, $439,700 face value of bonds issued by respondent, and shares of no-par stock (R. 25–26).[4] Such bonds and common stock are presently outstanding (R. 26). Respondent also mortgaged the leasehold estate and other hotel property for $125,000.00 (R. 26).

[3] The Court of Claims found that the property here involved, by reason of the first lien and foreclosure proceedings in the State court, was never administered by the trustee in bankruptcy, and that no dividend was ever paid in the bankruptcy proceeding to any creditor of the corporation (R. 25).

[4] Holders of the remaining first mortgage bonds received proportionate distributive shares from the proceeds of the $25,000 paid at the foreclosure sale (R. 26).

This mortgage indebtedness is presently outstanding in the principal amount of $115,000.00, with unpaid interest at 6 per cent from January 1, 1942 (R. 26).

On December 26, 1930, the referee appointed by the state court in the foreclosure proceeding delivered to respondent a deed conveying the leasehold estate and other property covered by the sale (R. 26). Shortly thereafter, the respondent obtained quitclaim deeds from the trustee in bankruptcy of the original corporation, the trustees under the second mortgage, and the trustee of the first mortgage (R. 26). On December 22, 1930, the Superintendent of the Military Academy gave written approval "* * * of the assignment of the lease. * * *" (R. 26.) Respondent took possession of the hotel on January 1, 1931 and operated it under the terms of the lease until March 10, 1943 (R. 27).

On January 5, 1943, respondent suggested to the Secretary of War, by letter, that conditions then existing made the operation of the hotel impossible and that the hotel might have to be closed (R. 27). Respondent stated that, if the hotel fell into the hands of outside interests, the bondholders would be deprived of any return on their original investment, and that the operation of the hotel might then be conducted to the detriment of the officers and cadets of the Academy and their guests (R. 27). The solution of this

problem urged by respondent was government ownership and operation of the hotel (R. 27). Respondent, accordingly, requested that the Secretary of War declare the lease forfeited, in accordance with its provisions (R. 27–28). The occasion for the forfeit was to be a default by the respondent, namely, the closing of the hotel (R. 28). Respondent finally stated in the letter of January 5, 1943 that its "* * * holdings and the value thereof depend[ed] upon a contract * * *" and that if the method of cancellation provided in the lease were followed, just compensation to the lessee would be available to profect it (R. 27–28). Details of the forfeiture of the lease were worked out (R. 28, 29) and the hotel was closed by respondent on March 10, 1943, on which day it was taken over by agents of the Secretary of War (R. 29).

On April 19, 1943, respondent wrote to the Secretary of War with regard to just compensation under the lease and fixed the tentative amount at $2,300,000.00 (R. 30). On May 19, 1943 this action was instituted by respondent in the court below (R. 1). The complaint alleged that no reply had been made by the Secretary of War to its request for just compensation in the amount of $2,300,000.00 and prayed for judgment in the sum of $1,932,000.00 (R. 5).[5]

[5] On May 21, 1943, the Secretary of War answered respondent's letter of April 19 stating that the tentative amount of $2,300,000.00 appeared far in excess of the prop-

The court below found the fair and reasonable original cost of constructing the hotel and its appurtenances to be approximately $1,300,000.00 (R. 30).[5] The court below further found that the reproduction cost as of March 10, 1943, would have been $1,138,160.00 without landscaping or financing costs (R. 31). The court below then concluded that, considering "* * * all relevant facts and circumstances * * *", the fair and reasonable value of the hotel as of March 10, 1943 was $820,682.00 (R. 31–32). To this amount was added the fair and reasonable value of the hotel equipment, giving a total of $867,682.00 (R. 32). To this total, the court below added interest at 4 percent from March 10, 1943, as an addition necessary to constitute "* * * just compensation as of the date of payment * * *" (R. 32).

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erty's reasonable value and that it would be necessary to have the matter determined in court (R. 30).

[5] In connection with this finding, the court below also found that the books of original entry covering cost of construction had been destroyed on or about February 25, 1938, by the attorneys for the trustee in the bankruptcy proceedings mentioned above (R. 30). In its opinion, the court below stated, after referring to the destruction of the original books of entry, that the evidence surviving as to actual original cost of construction was in general "* * * too fragmentary, indefinite, and otherwise unreliable to warrant definite findings * * *" (R. 36). The findings of an original cost of $1,300,000.00 which the court below, nevertheless made, was characterized "* * * as approximate only * * *" (R. 36).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In failing to hold that Section 177 (a) of the Judicial Code precluded it from allowing interest on this claim against the United States prior to the time of rendition of its judgment.

2. In holding that the use of the words "just compensation" in the Act of March 30, 1920, *supra*, called for the same assessment of damage as would apply to a taking of property by eminent domain.

3. In holding that the Act of March 30, 1920, *supra*, authorized it to award interest prior to the date of its judgment.

4. In including in its judgment interest on the claim.

REASONS FOR GRANTING THE WRIT

1. Section 177 (a) of the Judicial Code expressly prohibits the allowance of interest by the Court of Claims prior to the date of that court's judgment unless the claim is founded on a contract which expressly stipulates for the payment of interest. The decision of the Court of Claims herein, in awarding interest to respondent, is in direct disregard of this statutory prohibition and in conflict with the principle of numerous decisions of this Court. *United States* v. *Goltra*, 312 U. S. 203; *Smyth* v. *United States*, 302 U. S. 329, 353; *United States* v. *North American Co.*, 253 U. S. 330, 336; *United States* v.

Verdier, 164 U. S. 213, 216; *Tillson* v. *United States,* 100 U. S. 43.

The opinion of the court below gives superficial recognition to the provisions of Section 177 (a) but seeks to overcome the statutory bar by characterizing the interest awarded, in its judgment, as "* * * not * * * interest but * * * part of just compensation." (R. 38). Thus, the court below has attempted to create a verbal formula to remove its action from the ambit of Section 177 (a) and to place it under rules applicable solely to damage awards appropriate in eminent domain or requisition cases under the Fifth Amendment. Concededly, an award of damages under the Fifth Amendment for a taking of property includes interest from the date of the taking if payment be delayed. *Jacobs* v. *United States,* 290 U. S. 13; *Phelps* v. *United States,* 274 U. S. 341. But the essential element which justifies the use of this measure of damages is the existence of an actual taking. *United States* v. *Goltra, supra,* at p. 208; *Shoshone Tribe* v. *United States,* 299 U. S. 476, 497; *Phelps* v. *United States, supra,* at p. 344; *Seaboard Air Line Ry. Co.* v. *United States,* 261 U. S. 299, 305. Here, as the court below expressly recognized, the suit "* * * is on a contract and not for compensation under the Fifth Amendment. * * *." (R. 37). There is no element of taking or eminent domain in this

case.[7] Absent such a taking, nothing short of express language by Congress or an express contract stipulation within the meaning of Section 177 (a) suffices to validate an award of interest by the court below. *United States* v. *Goltra, supra; Boston Sand Co.* v. *United States,* 278 U. S. 41; *Tillson* v. *United States, supra.* There is no express provision in the appropriation act here involved, (the Act of March 30, 1920) with regard to payment of interest. See 7 Op. A. G. 523, 525. Nor is there anything in the legislative history of the statute to indicate that Congress intended the "just compensation" authorized therein to constitute more than a provision whereby the lessee might "* * * have a fair opportunity at least * * *" to recoup on his investment at the expiration of the term of the lease. 59 Cong. Rec. 3032; see also 59 Cong. Rec. 3031; H. Rep. No. 620, 66th Cong., 2d sess.; H. Rep. No. 754, 66th Cong., 2d sess. And there is no contract provision here involved giving any greater right in respect of interest than the stat-

[7] On May 20, 1943, the day after the instant case was commenced, the United States filed a condemnation suit for the property here involved, in the United States District Court for the Southern District of New York. On February 7, 1944, an order was entered in that action staying all further proceedings therein, pending final disposition of the case in the Court of Claims (R. 30). Whether that suit was maintainable in the light of the contract here involved is now a moot question. In any event, if there had been a taking of respondent's property by eminent domain, it would have had to be accomplished in that suit and not by contract.

ute conferred. The contract itself merely attempted to reproduce the terms of the statute.[8] Accordingly, we submit that the emphasis of the court below on the words "just compensation" contained in the Act of March 30, 1920, *supra*, and in the lease upon which the suit was based is not sufficient to avoid the provisions of Section 177 (a) of the Judicial Code and leads to a result which is in direct conflict with the decision of this Court in *United States* v. *Goltra*, 312 U. S. 203.

2. The question presented is one of importance. The decision herein underscores a tendency by the court below to attempt to overcome Section 177 (a) and to grant interest whenever, in its opinion, such interest should be included in its judgment.[9] We submit that Section 177 (a) and

[8] As the court below noted, the lease does not follow the exact wording of the Act of March 30, 1920, *supra*, in providing for just compensation (R. 36). The statute provides that the lease "* * * shall also provide for just compensation to the lessees for the construction of said hotel, appurtenances, and equipments, to be paid * * * at the termination of said lease." (R. 22.) The lease provides that "* * * just compensation shall be made * * * for the construction of said hotel appurtenances and equipments which may then be upon the demised premises." (R. 23). We do not believe that the minor difference in wording has any significance for the issue here presented. In any event, the lease could not create any higher liability than that authorized by the Act of March 30, 1920, *supra*.

[9] An illustration of this tendency, without any attempt at justification, is contained in the opinion of the Court of Claims in *N. Y. Rayon Importing Co., Inc.* (#2) *et al.* v. *United States*, Court of Claims Docket No. 45861, decided February 4, 1946. A petition for a writ of certiorari has also been filed by the Government in that case, No. 1181, this Term.

the controlling decisions of this court may not be thus disregarded, nor should the court below be permitted to establish a waiver of governmental immunity going beyond the scope permitted by Congress. From the standpoint of governmental finance, the importance of the review sought herein is obviously very great.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

MAY 1946.

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FILE COPY

No. 106

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES, PETITIONER,

v.

THE THAYER-WEST POINT HOTEL COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No 106

UNITED STATES, PETITIONER

v.

THE THAYER-WEST POINT HOTEL COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 32–38) has not yet been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 4, 1946 (R. 38). The petition for a writ of certiorari was filed on May 15, 1946 and was granted on October 14, 1946 (R. 39). The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925, as amended, 28 U. S. C. 288 (b).

QUESTION PRESENTED

Whether Congressional use of the phrase "just compensation," in a statute authorizing a lease of Government land for the construction of a hotel and payment to the lessee at the termination of the lease for buildings constructed by him upon the land, empowered the Court of Claims to include in its judgment interest from the date of the agreed termination of the lease, despite the provisions of Section 177 (a) of the Judicial Code.

STATUTES INVOLVED

1. The pertinent part of the Military Academy Appropriation Act, 1921 (Act of March 30, 1920, 41 Stat. 538, 548), provides:

> That the Secretary of War is hereby authorized to lease land on the United States Military Reservation at West Point, for a term of not exceeding fifty years, to any corporation, company, or individual, upon which to erect a hotel, and all other necessary buildings in connection therewith, in accordance with plans and specifications submitted to and recommended by the Superintendent of the Military Academy, and approved by the Secretary of War. Said lease shall contain such conditions, terms, reservations and covenants, as may be agreed upon and shall also provide for just compensation to the lessees for the construction of said hotel, appurtenances, and equipments, to be paid to

said lessees at the termination of said lease.

2. The pertinent part of Section 177 (a) of the Judicial Code, 28 U. S. C. 284, provides:

> (a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, * * *.

STATEMENT

Pursuant to authorization contained in the Act of March 30, 1920, *supra,* the Secretary of War, on October 17, 1924, leased a tract of land within the West Point Military Reservation to one Herbert Williams for the purpose of having a hotel constructed and operated on the land thus leased. The lease was for a term of 50 years from October 17, 1924, and was made in consideration of one dollar (R. 6, 22). Williams agreed to erect a hotel and all other necessary buildings in connection therewith, in accordance with plans which he had submitted with his bid, and subject to approval of final plans and specifications by the Superintendent of the Military Academy and by the Secretary of War (R. 22). The lease provided that the title to such buildings should remain in the lessee until the expiration of the term, or until cancellation by the Secretary of War in the manner provided in the lease, and that, on such termination, title to the buildings

should pass at once to the United States subject to the lease provisions for the payment of just compensation by the United States (R. 22–23). The lease also provided that, on termination by expiration of the fifty year term, "just compensation" would be made to Williams for the "* * * construction of said hotel, appurtenances and equipments which may then be upon the demised premises" (R. 11, 23).[1] Williams' main undertakings were to begin construction within six months and to complete the hotel within two years thereafter (R. 6); to furnish protective bonds against liens (R. 7); to establish approved standard rates for rooms and meals, with certain discounts to specified classes of persons (R. 7); to provide fire, liability and compensation insurance (R. 8); to restore or repair buildings damaged by fire (R. 8); and to operate the hotel at all times during the continuance of the lease (R. 8–9). Upon the lessee's failure to observe these and the other conditions of the lease, the Secretary of War, after giving reasonable opportunity to correct the deficiency, could nullify and forfeit the lease. In that event, "just compensation shall be made to the party of the second part, or his assigns, for the con-

[1] The Act of March 30, 1920, *supra*, provided for just compensation to the lessee for "the construction of said hotel, appurtenances, and equipments, to be paid to said lessees at the termination of said lease" (R. 22).

struction of said hotel, appurtenances and equipments" (R. 11, 23).

In addition to the lease of land to Williams for one dollar ground rent with "just compensation" at termination or forfeiture, the Secretary of War agreed to furnish the hotel with electricity for light and power at the same price paid by the Quartermaster Department to the Military Academy (R. 9); to furnish the hotel a water supply at cost (R. 9–10); to permit the hotel to obtain surplus ice from ponds on the Military Reservation (R. 9); and to allow the hotel to utilize the Academy sewerage system without charge (R. 10). It was also agreed that if another hotel should be permitted or erected on the West Point reservation, the lessee had the option of terminating the lease and securing "just compensation as above provided as of the date of such termination" (R. 12). Other minor concessions were made (R. 9–10).

Williams assigned the lease to the Thayer-West Point Hotel *Corporation*, a corporation organized under the laws of New York on March 20, 1925, which constructed and completed a hotel within the time required by the lease (R. 24, 22). Prior to the completion of construction, on August 1, 1925, that corporation conveyed the lease and the corporation's interest therein, together with the corporation's right, title or in-

terest to any building placed on the land covered by the lease, personal property used therein, and all compensation to become due upon the termination of the lease, to trustees under an indenture which secured bonds in the aggregate amount of one million dollars issued by the corporation to finance construction (R. 24).[2]

The corporation took possession of the hotel buildings in June, 1926, prior to completion, and operated the hotel thereafter under the terms of the lease (R. 24). On August 8, 1927, the corporation was adjudicated a bankrupt in the United States District Court for the Southern District of New York (R. 25), and, in an apparently contemporaneous foreclosure action brought by the first mortgage trustees in the New York Supreme Court, a judgment was entered on January 17, 1929, which ordered the sale of the property described in the first mortgage (R. 25).[3] The leasehold estate and other properties covered by the first mortgage were sold on July 8, 1930, at a public foreclosure sale, to a committee acting on behalf of certain holders of the corporation's

[2] On April 1, 1927, the corporation entered into a second mortgage arrangement to secure a $500,000 issue of bonds (R. 24).

[3] The Court of Claims found that the property here involved, by reason of the first lien and foreclosure proceedings in the State court, was never administered by the trustee in bankruptcy, and that no dividend was ever paid in the bankruptcy proceeding to any creditor of the corporation (R. 25).

mortgage bonds (R. 25). The sale price was $25,000 and a deficiency judgment of $1,235,067.67 was entered against the corporation (R. 25).

The bondholders' committee, pursuant to a plan of reorganization under which the hotel was purchased, assigned the interest acquired at the foreclosure sale to the respondent herein, The Thayer-West Point Hotel *Company,* a new corporation organized under the laws of Delaware on November 7, 1930 (R. 22, 25–26). First mortgage bondholders of the original corporation surrendered bonds to the extent of $879,400 face value out of the one million dollars issued, and received, in exchange, $439,700 face value of bonds issued by respondent, and shares of no-par stock (R. 25–26).[4] Such bonds and common stock are presently outstanding (R. 26). Respondent also mortgaged the leasehold estate and other hotel property for $125,000.00 (R. 26). This mortgage indebtedness is presently outstanding in the principal amount of $115,000.00, with unpaid interest at 6 percent from January 1, 1942 (R. 26).

On December 26, 1930, the referee appointed by the state court in the foreclosure proceeding delivered to respondent a deed conveying the leasehold estate and other property covered by the sale (R. 26). Shortly thereafter, the respondent obtained quitclaim deeds from the trustee in

[4] Holders of the remaining first mortgage bonds received proportionate distributive shares from the proceeds of the $25,000 paid at the foreclosure sale (R. 26).

bankruptcy of the original corporation, the trustees under the second mortgage, and the trustee of the original first mortgage (R. 26). On December 22, 1930, the Superintendent of the Military Academy gave "his written approval of the assignment of the lease" (R. 26). Respondent took possession of the hotel on January 1, 1931 and operated it under the terms of the lease until March 10, 1943 (R. 27).

On January 5, 1943, respondent suggested to the Secretary of War, by letter, that conditions then existing made the operation of the hotel impossible and that the hotel might have to be closed (R. 27). Respondent stated that, if the hotel fell into the hands of outside interests, through the foreclosure of the existing first mortgage, the bondholders would be deprived of any return on their original investment, and that the operation of the hotel might then be conducted to the detriment of the officers and cadets of the Academy and their guests (R. 27). The solution of this problem urged by respondent was government ownership and operation of the hotel (R. 27). Respondent, accordingly, requested that the Secretary of War declare the lease forfeited, in accordance with its provisions (R. 27–28). The occasion for the forfeit was to be a default by the respondent, namely, the closing of the hotel (R. 28). Respondent stated that since its "holdings and the value thereof depend[ed] upon a contract, authorized by and embodied in the lease,"

just compensation to the lessee would be available to protect it, if the method of cancellation provided in the lease were followed (R. 15, 27–28). The Secretary of War agreed to this procedure (R. 17, 29). Details of the forfeiture of the lease were worked out (R. 28, 29) and the hotel was closed by respondent on March 10, 1943, on which day it was taken over by agents of the Secretary of War (R. 29). The Secretary formally annulled the lease on March 24, 1943 (R. 29–30).

On April 19, 1943, respondent wrote to the Secretary of War with regard to just compensation under the lease and fixed the tentative amount at approximately $2,300,000.00 (R. 30). On May 19, 1943, the present action was instituted by respondent in the court below (R. 1). The complaint alleged that no reply had been made by the Secretary of War to its request for just compensation in the amount of $2,300,000.00[3] and prayed for judgment in the sum of $1,932,000.00 (R. 5).[4]

[3] On May 21, 1943, the Secretary of War answered respondent's letter of April 19, stating that the tentative amount of $2,300,000.00 appeared far in excess of the property's reasonable value and that it would be necessary to have the matter determined in court (R. 30).

[4] On May 20, 1943, the day after the instant case was commenced, the United States filed a condemnation suit for the property here involved in the District Court of the United States for the Southern District of New York. On February 7, 1944, an order was entered in that action staying all further proceedings therein, pending the final determination of the instant case in the Court of Claims (R. 30).

The court below found the fair and reasonable original cost of constructing the hotel and its appurtenances to be approximately $1,300,000.00 (R. 30).[7] The court further found that the reproduction cost as of March 10, 1943, would have been $1,138,160.00 without landscaping or financing costs (R. 31). Market value for the hotel was found to be non-existent as of that date (R. 31). It was then concluded that, considering "all relevant facts and circumstances," the fair and reasonable value of the hotel as of March 10, 1943 was $820,682.00 (R. 31–32). To this amount was added the fair and reasonable value of the hotel equipment ($47,000), giving a total of $867,682.00 (R. 32). To this total, the court below added interest at 4 per cent from March 10, 1943, as an addition necessary to constitute "just compensation as of the date of payment" (R. 32). Judge Whitaker dissented, stating that "$500,000 would be liberal compensation" (R. 38).

[7] In connection with this finding, the court below also found that the books of original entry, covering cost of construction, had been destroyed on or about February 25, 1938, by the attorneys for the trustee in the bankruptcy proceedings mentioned above (R. 30). In its opinion, the court below stated, after referring to the destruction of the original books of entry, that the evidence surviving as to actual original cost of construction was in general "too fragmentary, indefinite, and otherwise unreliable to warrant definite findings with regard thereto" (R. 36). The finding of an original cost of $1,300,000.00 which the court below nevertheless made was characterized as "therefore approximate only" (R. 36).

The petition for the writ of certiorari raises only the issue of the addition of interest since March 10, 1943. The United States raises no question as to the basic award of $867,682, nor has the respondent filed a cross petition questioning the judgment.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In failing to hold that Section 177 (a) of the Judicial Code precluded it from allowing interest on this claim against the United States prior to the time of rendition of its judgment.

2. In holding that the use of the words "just compensation" in the Act of March 30, 1920, *supra,* called for the same assessment of damage as would apply to a taking of property by eminent domain.

3. In holding that the Act of March 30, 1920, *supra,* authorized it to award interest prior to the date of its judgment.

4. In including in its judgment interest on the claim.

SUMMARY OF ARGUMENT

Since Section 177 (a) of the Judicial Code forbids interest to be "allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest," the lower court's allowance of interest cannot

stand unless the words "just compensation * * * for the construction of said hotel," in the Act of March 30, 1920, and in the lease, are held to require such an allowance. The only instances in which the phrase "just compensation" has hitherto been considered to include the payment of interest are eminent domain matters, but no claim is made here that Congress was actually exercising its eminent domain power in the 1920 Act. The most that can be claimed is that Congress intended to use the term in its full eminent domain sense, even though there was to be no eminent domain taking. This contention is entirely unsupported, and [illegible] the lower court's award of interest.

1. "Just compensation" is not a word of art necessarily importing an obligation to pay interest. It is commonly used to describe the proper measure of damages in normal tort or contract actions. It has been used by the Congress in permitting suit on a claim for the tortious forfeiture of a lease, and this Court has refused to award interest. *United States* v. *Goltra*, 312 U. S. 203. Indeed, the only cases in which "just compensation" has been held to require the allowance of interest have been instances of the actual exercise of the eminent domain power. In these cases, the addition of interest has been rested squarely on the requirements of the Fifth Amendment and not on the statutory provision

for "just compensation," or other particular form of words chosen by the legislature. Where private property is taken *in invitum* by the Government, the Constitution demands that the owner be made whole as of the time he loses use or possession of the property; when payment is deferred, interest is necessary to produce the full equivalent of the property's value paid contemporaneously with the taking. But where the Government does not impose its will upon the owner, and he is free to sell his property, and to bargain for the terms of its sale, there is neither Constitutional nor policy reason to assure him of this full measure of protection. He is subject to the usual rules governing those dealing with the Government, and is held not entitled to interest on the sale price, even if payment is delayed, unless there is an express stipulation for interest in the contract.

2. The Act of March 30, 1920, contemplates a wholly voluntary and consensual arrangement, and it is therefore highly improbable that the Congress intended to *require* the allowance of interest which is ordinarily accorded only where property is taken *in invitum* by eminent domain. Respondent's assignor freely undertook the obligations of the lease, and the terms of the agreement he made with the Government were entirely open to negotiation and bargaining. He could have insisted on detailed provision for "just com-

pensation," including a stipulation for interest or a specific sum. There was no hint of an involuntary "taking" in the entire transaction. Respondent's claim is purely a contractual one, founded on a contract voluntarily negotiated by its predecessor. In these circumstances, it is just as improbable that the Congress intended in the 1920 Act to require the payment of interest as it was in the legislation considered in *United States* v. *Goltra, supra.*

3. Likewise, the legislative history of the 1920 Act, together with the then prevailing eminent domain concept of "just compensation", fortifies the position that the Congress did not intend to require the allowance of interest. Not only is the legislative history of the statute devoid of all reference to eminent domain, but there is strong indication therein that the matter of compensation was conceived as one for settlement by agreement rather than on the basis of an eminent domain concept. Moreover, at the time of the enactment of the 1920 Act, there was in existence no ruling by this Court to the effect that even in an eminent domain case, interest was allowable where the suit was brought by the claimant against the United States. Hence, the Congress legislated in the light of the prevailing doctrine rather than on the hypothesis of a different concept which was later to be enunciated by this Court.

4. Any doubt as to the proper construction of the 1920 Act and of the lease should be resolved in favor of the Government, by the long-established presumption that non-eminent domain statutes intend to bar interest unless the Congress expressly or specifically provides to the contrary.

5. Nor does the lease itself stipulate for the payment of interest, either expressly or by implication. Interest is never mentioned, and the statutory formula is merely reiterated, without more, both in the case of termination by expiration of the fifty-year term, and of the Government's annulment of the lease for breach by the lessor. In the latter case, which is the present situation, it is especially unlikely that the parties intended to allow interest. The lessee's own fault having occasioned the premature take-over and having necessitated the immediate determination of the compensation award, it would be most unfair to saddle the Government with interest charges during the time it takes to compute the amount.

ARGUMENT

RESPONDENT IS NOT ENTITLED TO INTEREST FOR ANY PERIOD PRIOR TO THE RENDITION OF THE JUDGMENT BELOW

In the instant case, the Court of Claims entered judgment for respondent for the value of the hotel property at West Point together with interest thereon from March 10, 1943, the date

on which the United States took over the property pursuant to contract. It purported to find justification for its allowance of interest in the face of the prohibitory statute because of the fact that both the contract and the statute employed the words "just compensation." We submit that the presence of those words in the authorizing statute and in the contract constitutes no justification for evading the plain prohibition against the allowance of interest contained in Section 177 (a) of the Judicial Code, 28 U. S. C. 284, *supra*.

Section 177 (a) of the Judicial Code provides that "No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest * * *." Accordingly, it is well settled that interest may not be recovered in a suit against the United States unless specifically provided for by contract or authorized by act of Congress.[8] Section 177, derived from the Act of March 3, 1863, 12 Stat. 765, 766, is merely declaratory of the common law principle that interest does not run against the Government in the absence of a statute or a contract evincing a contrary

[8] *Tillson* v. *United States*, 100 U. S. 43; *United States* v. *Verdier*, 164 U. S. 213, 216; *United States* v. *North American Co.*, 253 U. S. 330, 336; *Smyth* v. *United States*, 302 U. S. 329, 353; *United States* v. *Goltra*, 312 U. S. 203.

intention.[9] An apparent exception to this rule is that, in the case of a taking of property under the power of eminent domain, interest from the date of the taking is included in the recovery as a part of just compensation.[10] This doctrine is based upon the theory that the Fifth Amendment entitles the owner to receive the full value of his property at the time of the taking. Hence, interest is included in the award not as such, but as a means of putting the condemnee in as good a financial position as he would have enjoyed had he received compensation at the time of the taking.[11] "The allowance of interest in eminent

[9] *Boston Sand Co.* v. *United States*, 278 U. S. 41; *United States* v. *Commonwealth Line*, 278 U. S. 427; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 304; *United States* v. *North American Co.*, 253 U. S. 330, 336; *United States* v. *North Carolina*, 136 U. S. 211, 216; *United States ex rel. Angarica* v. *Bayard*, 127 U. S. 251, 260; *United States* v. *Sherman*, 98 U. S. 565, 567–568; *Smyth* v. *United States*, 302 U. S. 329, 353; *Sheckels* v. *District of Columbia*, 246 U. S. 338, 340; 1 Op. Atty. Gen. 268, 550, 554; 3 Op. Atty. Gen. 635; 4 Op. Atty. Gen. 14, 136, 286, 7 Op Atty. Gen. 523; 9 Op. Atty. Gen. 57, 449.

[10] *United States* v. *Rogers*, 255 U. S. 163; *United States* v. *Benedict*, 261 U. S. 294; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306; *Brown* v. *United States*, 263 U. S. 78, 86–88; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106; *Liggett & Myers Tobacco Co.* v. *United States*, 274 U. S. 215; *Phelps* v. *United States*, 274 U. S. 341; *Jacobs* v. *United States*, 290 U. S. 13; *United States* v. *Creek Nation*, 295 U. S. 103, 111; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 496.

[11] *United States* v. *Rogers*, 255 U. S. 163, 169; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306; *Jacobs* v. *United States*, 290 U. S. 13; *United States* v. *Creek Nation*,

domain cases is only an apparent exception, which has its origin in the Constitution." *Smyth* v. *United States*, 302 U. S. 329, 353. See *infra*, pp. 24–27.

Respondent's suit rests wholly upon the terms of its lease-agreement with the Government (R. 5), and no claim is made that the hotel has been taken under the power of eminent domain. The Court of Claims expressly stated that "here there was no taking in the legal sense" (R. 36), "the suit here is on a contract and not for compensation under the Fifth Amendment" (R. 37), and "neither in the Act nor in the lease is there any provision for just compensation for a taking" (R. 36).[12] Nor is it claimed by respondent or

295 U. S. 103, 111; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 496; *United States* v. *Klamath Indians*, 304 U. S. 119, 123.

[12] As stated above, footnote 6, p. 9, on May 20, 1943, the day after respondent instituted the present suit, the United States filed a condemnation action for the property here involved. The Secretary of War had previously indicated that condemnation proceedings would be instituted "for the purpose of clearing the title to the buildings, appurtenances and equipment, and of determining the just compensation to be paid to the owners in accordance with the statute" (R. 17, 29). On February 7, 1944, an order was entered in that action staying all further proceedings therein, pending final disposition of this case (R. 30). In view of the judgment entered in the instant suit, that case is, of course, now moot. In any event, if there had been a taking of respondent's property by eminent domain, just compensation for the taking could have been adjudicated in that suit, but in the present suit respondent does not base its claim on such a taking, and whether there was a taking for the purpose of that case is not material in the case at bar.

by the court below that either the Act of March 30, 1920, or the lease-agreement, provides in terms for interest to be paid by the United States. Interest was nevertheless claimed from the day the Government took possession of the hotel to the date of the judgment below, and the Court of Claims, although purporting to recognize Section 177 (a) of the Judicial Code, awarded "interest at four percent per annum from March 10, 1943, to the date of payment, not as interest but as a part of just compensation" (R. 32).

In the absence of any claim of an eminent domain taking, respondent and the lower court must find their sole warrant for the award of interest in the language "just compensation * * * for the construction of said hotel, appurtenances, and equipments" which appears in the statute, and which was carried over by the parties into the lease. As in *United States* v. *Goltra*, 312 U. S. 203, 207–208, respondent's "argument is that the words 'just compensation' have within themselves the same legal significance of interest on the award or damages from the date of the taking as has been given to these same words as used in the Fifth Amendment," and the Court of Claims so held (R. 38). In our view, neither the language of the 1920 Act nor that of the lease justifies an award of interest. The term "just compensation" does not in and of itself connote an award of interest and the nature of the arrangement contemplated by the 1920 Act makes

it very improbable that the Congress desired to assimilate respondent's recovery to a complete eminent domain award.

A. "JUST COMPENSATION" NORMALLY IMPLIES AN OBLIGATION TO PAY INTEREST ONLY WHERE THE CONSTITUTION REQUIRES SUCH PAYMENT TO MAKE WHOLE OWNERS WHOSE PROPERTY IS INVOLUNTARILY TAKEN BY EMINENT DOMAIN

1. The words "just compensation" are not words of art necessarily or even commonly importing an obligation to pay interest. In condemnation cases, the Fifth Amendment provision that private property shall not be taken for public use without "just compensation" requires the award of interest from the date of taking. See *supra*, p. 17. But even as used in the Fifth Amendment, "just compensation" does not refer solely to the eminent domain measure of damages. It has also been used to describe the right of a utility to a reasonable rate of return, on the fair value of its property. See *West* v. *Chesapeake and Potomac Tel. Co.*, 295 U. S. 662, 671. And "just compensation" is widely used both by the courts and by text writers to describe the measure of compensation in actions to recover damages for torts or breach of contract.[13] The Court of

[13] See e. g., *Hetzel* v. *Baltimore & Ohio Railroad Co.*, 169 U. S. 26, 37; *Yorkomian* v. *Russell*, 90 Conn. 481, 485, 97 Atl. 760; *Howey* v. *New England Nav. Co.*, 83 Conn. 278, 76 Atl. 469; *Tulley* v. *Tranor*, 53 Cal. 274, 280; Sutherland, *Damages* (3d ed. 1903), p. 36 *et seq.*

"The fundamental principle of the law of damages is that one injured by a breach of a contract or by a wrongful or

Claims has itself denied interest on a special statutory claim for "just compensation." *Squaw Island Freight Terminal Co.* v. *United States,* 89 C. Cls. 269, 278.[14] Cf. *Chickasaw Nation* v. *United States,* 94 C. Cls. 215, 239. And this Court has also declined to read an authority to allow interest into a statutory prescription to pay "just compensation" for property taken over by the Government otherwise than by eminent domain. In the closely analogous case of *United States* v. *Goltra,* 312 U. S. 203, certain tugs and barges which had been leased to the plaintiff by the Government had been tortiously seized by an Army officer under orders from the Acting Secretary of War. Goltra failed to secure possession of the boats through several court proceedings, and the Congress ultimately enacted a special jurisdictional act granting the Court of Claims authority to hear the claimant's case and to award "just compensation to him for certain vessels and unloading apparatus taken, whether tor-

negligent act or omission shall have fair and just compensation commensurate with the loss sustained." 15 Amer. Juris. 400.

"The primary object of an award of damages in a civil action, and the theory upon which it is based, is just compensation or indemnity for the loss or injury sustained by the complainant." 17 Corp. Jur. 716.

[14] That jurisdictional act granted authority to hear the plaintiff's claim for "just compensation to it for loss of property and/or damages occasioned by the breaking of an inadequate and/or improperly and insufficiently constructed government dike on Squaw Island."

tiously or not, on March 25, 1923, by the United States under orders from the Acting Secretary of War, for the use and benefit of the United States." As here, the Court of Claims allowed interest "not as interest but as a part of just compensation." On appeal, this Court reversed, holding (312 U. S., at 211), first, that the "unauthorized taking and judicially approved retention was in no sense an exercise of the power of eminent domain," and, secondly, that "if interest was to be allowed for so long a period upon an ordinary claim, and contrary to established governmental practice, Congress would have so declared." Here, there has likewise been no exercise of the eminent domain power, and the claim upon which respondent sues is an ordinary contractual claim. Established governmental practice has long denied interest on just such claims (Judicial Code, Section 177 (a); and see *supra*, pp. 16–17), and mere Congressional use of the "just compensation" formula should no more constitute a departure from this practice in the instant case than it did in the *Goltra* case. There is even stronger reason for denying interest here, where the Government's acquisition of respondent's hotel followed from a voluntary agreement bearing respondent's full consent that the lease should be forfeited, in accordance with its terms, while the *Goltra* case involved the forfeiture of his lease and the consequent recapture by the Government of the property against Goltra's will.

These are all instances of judicial or legislative use of "just compensation" in other than the eminent domain sense. As we point out below (*infra*, pp. 35–40), in 1920 there existed a substantial understanding that even in eminent domain proceedings "just compensation" did not always entail an award of interest. It is clear, therefore, that there has been no usage of the term as always denoting an eminent domain measure of damages, and hence as always requiring the payment of interest. Indeed, the only cases[15] respondent can cite in which the term "just compensation" has been held to carry with it an award of interest are those involving instances of the actual exercise of the eminent domain power.[16] In those instances in which the Congress was not acting under its eminent domain power, its use of the term "just compensation" has been held not to justify such an award. *United States* v. *Goltra, supra; Squaw Island Freight Terminal Co.* v. *United States, supra.*

2. Moreover, even in eminent domain cases, the granting of interest stems not from the wording of the statute under which suit is brought but

[15] *Virginia Engineering Company, Inc.* v. *United States*, 89 C. Cls. 457, decided November 6, 1939, which did allow interest in a non-eminent domain case, was on all fours with the *Goltra* case, and served as the sole authority for the Court of Claims' decision in the latter case (91 C. Cls. 42, 75), which this Court reversed in *United States* v. *Goltra, supra.*

[16] See cases cited in footnotes 10 and 11, *supra*, pages 17–18.

from the Constitution. The relevant cases have mainly arisen under one or another of the statutes enacted during World War I to provide for the exercise of the federal eminent domain power in connection with the national war effort. These statutes authorized the President to requisition property for war needs, and to modify, suspend, cancel, or requisition contracts of certain types; directed him to pay "just compensation" therefor; and provided that the United States might be sued for any balance necessary to make up "just compensation."[17] The opinions of this Court allowing interest against the United States in suits for takings of property under these statutes rest, clearly and explicitly, on the Fifth Amendment, and not on the statutory provisions for "just compensation."[18] These cases even suggest that interest would not have been allowed had the right to it depended on the statutes.

[17] Lever Act of August 10, 1917, Section 10, 40 Stat. 276, 279; Act of March 4, 1917, 39 Stat. 1168, 1193; Act of June 15, 1917, 40 Stat. 182; National Defense Act of June 3, 1916, Sec. 120, 39 Stat. 166, 213.

[18] "Just compensation" in the Fifth Amendment need not, of course, have the same meaning as that term when used in a statute. Cf. *Towne* v. *Eisner*, 245 U. S. 418, 425. It is not the equivalence of words but of concepts that is significant. The provision of the Fourteenth Amendment that no state shall "deprive any person of * * * property, without due process of law" provides for the same measure of compensation as the Fifth Amendment's different wording. *United States ex rel. Tennessee Valley Authority* v. *Powelson*, 319 U. S. 266, 278–279.

Certainly this Court has never treated the phrase "just compensation" as equivalent to a provision for interest. In the leading case, *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 304, the Court said:

> Section 10 of the Lever Act authorizes the taking of property for the public use on payment of just compensation. There is no provision in respect of interest. Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function. * * *

And in *Jacobs* v. *United States,* 290 U. S. 13, 17, in describing the *Seaboard* decision, it was said:

> That suit was brought by the owner under § 10 of the Lever Act, which, in authorizing the President to requisition property for public use and to pay just compensation, said nothing as to interest. But the Court held that the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such an allowance was appropriate in order to make the compensation adequate. * * *

In *Smyth* v. *United States,* 302 U. S. 329, 353, Mr. Justice Cardozo aptly summarized the foundation for these interest awards in saying: "The allowance of interest in eminent domain cases is only an apparent exception, which has its origin in the Constitution." For this reason, in eminent

domain cases the phraseology of the particular act grounding the suit is immaterial; interest is included as required by the Constitution even if the suit is brought in the Court of Claims under the Tucker Act which is governed by Section 177 (a) (*Jacobs* v. *United States*, 290 U. S. 13, 17–18), under a special jurisdictional act which contains no mention of either interest or just compensation (*United States* v. *Creek Nation*, 295 U. S. 103, 105, 111–112; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 484–485, 496–497), or under a statute providing for "entire compensation." *Waite* v. *United States*, 282 U. S. 508; cf. *Yearsley* v. *Ross Constr. Co.*, 309 U. S. 18, 22. The constitutional requirement, and not the particular form of words chosen by the legislature, directs the award of interest. Or to put this conclusion in the narrower terms of statutory interpretation, these cases make it clear that in eminent domain matters the words "just compensation" are construed to include interest solely in order to satisfy the Constitution and sustain the validity of the jurisdictional acts. Cf. *Phelps* v. *United States*, 274 U. S. 341, 344.

3. This "apparent exception" to the rule that the Government is not chargeable with interest, i. e., the granting of interest in eminent domain cases, rests upon the principle that an owner whose property is taken from him *in invitum* by the Government is entitled to the full equivalent

of the property *at the time he loses its use or possession.* *United States* v. *Rogers*, 255 U. S. 163, 169, and cases cited in footnote 10, *supra*, p. 17. Interest represents either a "measure of compensation for the use and occupation during the period which precedes the passing of the title" (*United States* v. *North American Co.*, 253 U. S. 330, 337) or the increment which is necessary to make a later payment of the value at the time of taking "the full equivalent of that value paid contemporaneously with the taking." *Seaboard Air Line Ry. Co.* v. *United States*, *supra*, at p. 306. "The Government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken." *Phelps* v. *United States*, *supra*, at p. 344.

Where, however, the Government does not exercise its privilege of having the value of property judicially determined and the owner by free negotiation fixes the value of his property, neither the Constitution nor the dictates of fair dealing requires that he be assured by law of this full measure of protection. As in all business dealings, the matter then becomes one for bargaining and negotiation. In the case of the sovereign, the private person dealing with the Government must, of course, understand the contractual incidents of the Government's special status, and either accept these privileges, bargain for their

limitation where that can validly be done, or refuse to contract. Cf. *American Smelting & Refining Co.* v. *United States*, 259 U. S. 75, 78, 79.

Accordingly, an owner selling real or personal property to the Government is not entitled to interest on the sale price, even if payment is delayed, unless he expressly stipulates for interest in his contract. Judicial Code, Section 177 (a), 28 U. S. C. 284. *Smyth* v. *United States*, 302 U. S. 329, 353; *Tillson* v. *United States*, 100 U. S. 43, 47; *United States ex rel. Angarica* v. *Bayard*, 127 U. S. 251, 260; *Cherokee Nation* v. *United States*, 270 U. S. 476, 487; 9 Comp. Gen. 421. The same principle is illustrated in the cases holding that owners, whose property was requisitioned during World War I and who entered into agreements accepting the contractual compensation in full satisfaction of their claims for just compensation arising out of the requisition, were not entitled to interest. The claimants' suits were held to be founded on the contract rather than on the Government's exercise of its eminent domain authority. *New York & Porto Rico S. S. Co.* v. *United States*, 29 F. 2d 1014, 1017 (C. C. A. 2); *Atlantic Refining Co.* v. *United States*, 69 C. Cls. 713, certiorari denied, 282 U. S. 859; *Olympia Shipping Corporation* v. *United States*, 71 C. Cls. 251, 263–264, certiorari denied, 284 U. S. 680.[19]

[19] In *Albrecht et al.* v. *United States*, Nos. 148–151 and 155, now pending on writs of certiorari to the United States

B. SINCE THE ACT OF MARCH 30, 1920, CONTEMPLATES A WHOLLY VOLUNTARY ARRANGEMENT, IT IS HIGHLY IMPROBABLE THAT CONGRESS INTENDED TO ENTITLE RESPONDENT TO INTEREST AS OF RIGHT

The nature of the arrangement authorized by the Act of March 30, 1920, makes it highly unlikely that Congress intended to override the provisions of Section 177 (a) of the Judicial Code by assimilating the Government's acquisition of respondent's hotel to an eminent domain taking. In essence the legislative plan contemplated a voluntary and contractual arrangement. (See discussion, *infra*, pp. 30–31.) The Congress was obviously not exercising the power to condemn private property, nor was it enabling the Secretary of War to do so. The Act merely *authorized* (and does not *require*) the Secretary to make a contract with a willing contractor under which (1) a hotel would be erected by the contractor on the West Point Military Reservation, (2) the hotel would be operated by the contractor (or his assignees) for a specified term, not exceeding fifty years, the operator to have the hotel's revenues, and (3) at the end of the specified term, the land and the hotel would revert to the United States and the contractor would receive "just

Circuit Court of Appeals for the Eighth Circuit, the Government argues that the United States is not obligated to pay interest upon an award in condemnation proceedings where no determination of just compensation is made but where the award is fixed, at the owner's insistence, at the amount set by a contract, which gave the United States the right of possession prior to payment and made no provision for interest.

compensation * * * for the construction of said hotel, appurtenances, and equipments." These terms of the lease were statutory directives and requirements fully known in advance by prospective contractors, and, subject to the few statutory conditions, the matter was open to free negotiation. Except for specifying the maximum term of the lease, requiring the hotel to be built according to approved plans, and enjoining the Government to make "just compensation * * * for the construction" on termination, the Congress did not limit the parties' full power to contract. The agreement was to "contain such conditions, terms, reservations and covenants, as may be agreed upon." If the Secretary had insisted on too stringent terms, the contractor was free to withdraw from the negotiations. Since he would have no economic stake in land or hotel before consummation of the agreement, he would be under no individual pressure to undertake the project or to agree to any terms he deemed to be unfair or burdensome. In fine, there was no apparent influence, individual or governmental, which would impel the potential contractor to bargain away rights which prudence would dictate that he should retain.

With specific reference to the instant problem, the contractor could have insisted on a detailed provision concerning the "just compensation * * * for the construction" to which he would be entitled. He

could have expressly stipulated for interest,[20] and thus have avoided the bar of Section 177 (a), or have negotiated for a definite formula, or even for a specific sum to be paid on termination or cancellation. Moreover, the proper compensation to be paid on expiration of the lease term might well be thought to be closely related to the rates to be charged,[21] and therefore a proper subject for negotiation and explicit understanding. In short, it was left to the parties to make a mutually satisfactory agreement, just as if the Act had simply authorized the Secretary to lease the land for the construction of a hotel for a period not exceeding fifty years, on terms and conditions to be agreed upon by the parties.

C. THE LEGISLATIVE HISTORY OF THE ACT OF MARCH 30, 1920, AND THE THEN PREVAILING EMINENT DOMAIN CONCEPT OF "JUST COMPENSATION" INDICATE THAT CONGRESS DID NOT INTEND TO REQUIRE ALLOWANCE OF INTEREST

1. Legislative history of the Act of March 30, 1920.—There is nothing in the legislative history

[20] Certain "requisition charters" entered into by the Government and shipowners upon the requisition of vessels in World War I provided that "in case of loss or damage due to the operation of a risk assumed by the United States, *just compensation for such loss or damage, with interest at 6 per cent per annum*, commencing thirty days after proof of such loss or damage shall be paid by the United States." See *New York and Porto Rico Steamship Co.* v. *United States*, 29 F. 2d 1014 (C. C. A. 2). [Italics supplied.]

[21] The Court of Claims indicates that the basis on which the rates were actually set and approved does not appear (R. 37).

of the 1920 statute to indicate that the Congress intended "just compensation * * * for the construction" to include an award of interest. Such indications of congressional intention as do exist all point to a contrary result. The Military Academy Appropriation Act of March 4, 1919 (40 Stat. 1336, 1348), had authorized the Secretary of War to contract for the erection of a hotel at West Point, but, at the end of fifty years, the hotel was to become Government property without compensation, and the revenues (to be regulated by the War Department) were to be the contractor's sole source of recouping its investment.[22] No contract could be procured on these terms, and the next year it was recommended that more liberal terms, in the form later embodied in the 1920 Act, be authorized. H. Rep. No. 620, 66th Cong., 2d Sess. The debate in the House of Representatives reveals that the

[22] The 1919 Act provided:

"The Secretary of War is hereby authorized to allow any corporation, company, or individual to erect on the United States Military Academy reservation at West Point, New York, a hotel, in accordance with plans and specifications to be approved by the Superintendent of the United States Military Academy and to enjoy the revenue therefrom for a period of fifty years; after which time said hotel shall become the property of the United States: *Provided*, That the title and ownership of said hotel may be accepted by the Secretary of War on behalf of the United States at any time. That said hotel shall be conducted under such regulations including the rates and the charges for accommodations thereat as may be promulgated by the Superintendent of the United States Military Academy under the direction of the Secretary of War."

sponsors hoped that some individual or company could be induced, perhaps more for patriotic reasons than from pecuniary motives, to erect and operate the hotel. 59 Cong. Rec. 3031–3032. It was believed that the commercial possibilities were limited but that the new terms would offer the contractor "* * * a fair opportunity at least * * *" to recoup on his investment, by the date of the termination of the lease. 59 Cong. Rec. 3032. Some Representatives did inquire whether the hotel should not go to the United States without further payment at the end of fifty years, since the lessee would receive revenue from the hotel's operations, but those in charge of the bill explained that it was doubtful that the enterprise would be commercially profitable, and the additional inducement was believed necessary. 59 Cong. Rec. 3031–3032. A pertinent colloquy reveals that the term "just compensation" was not viewed as a rigid concept but mainly as a broad framework for agreement by the parties at the time the negotiations for the lease should take place. Congressman Evans of Nevada wondered whether the sponsor did not feel that "this is rather loose language with reference to the compensation." Congressman Morin answered:

> No; that would be in accordance with an agreement with the War Department

when they originally enter into the lease." 59 Cong. Rec. 3031.[23]

No reference was made during the House debate to eminent domain or condemnation, either by way of analogy or as directly applicable.[24]

The Senate Committee on Military Affairs substituted the old 1919 provision for transfer of the hotel after fifty years without payment, after deleting the clause authorizing the War Department to regulate rates and charges (S. Rep. No. 456, 66th Cong., 2d Sess., p. 2), and this proposal was adopted by the Senate without significant

[23] The full interchange is as follows:

"Mr. EVANS of Nevada. Does not the gentleman feel that this is rather loose language with reference to the compensation?

"Mr. MORIN. No; that would be in accordance with an agreement with the War Department when they originally enter into the lease. At the end of 15 or 20 years the Government may want to take it back and ask the occupant to remove it, or they may enforce regulations under which the occupant might not want to operate the hotel and could not operate it profitably.

"Mr. DONOVAN. If the gentleman will yield, the proposal is to give the Government the right of election, if it so decides, that it needs the ground and to award an equity to investors which will recompense them for the sum invested.

"Mr. MORIN. Yes."

[24] Apparently for parliamentary reasons, at the end of the discussion the paragraph authorizing the lease and the erection of the hotel was stricken on a point of order, with consent of the sponsors (59 Cong. Rec. 3032) and not actually adopted by the House at that time. It was apparently understood, however, that the paragraph embodied the views of the House, which the conferees were expected to support. No amendments were offered during the debate.

discussion. 59 Cong. Rec. 3672. In conference, the Senate conferees receded and the committee adopted the language recommended by the House Committee and debated in the House (59 Cong. Rec. 4044–4045). The conference reports (59 Cong. Rec. 4044–4045; 4074–4075) merely paraphrase the provision, and there was no debate in either house on its final adoption.

It is significant that the legislative history of the Act contains no reference to the principles of eminent domain, nor does it indicate any desire to allow the potential lessee-contractor special statutory privileges not normally accorded those with whom the Government deals or to whom it contracts to pay money. The one specific inquiry as to the content of "just compensation" brought forth the answer, from an authoritative member, that "that would be in accordance with an agreement with the War Department when they originally enter into the lease." See *supra*, pp. 33–34. The matter was evidently conceived as one for mutual agreement or contract, rather than as one which was to be settled solely by the application of judicial principles governing the exercise of the power of eminent domain.

2. *The eminent domain concept of "just compensation" prevailing in 1920.*—The state of the decisions, in 1920, with respect to the eminent domain concept of "just compensation," also throws a clarifying light on the Congressional use

of that term. In March 1920, when the statute here involved was enacted, this Court had not yet announced the first of the series of decisions which have established the principle that in eminent domain proceedings just compensation includes interest from the date of the taking to the time of payment. Prior to June 1920, this Court had in no case established the relation of interest to just compensation for property taken under the power of eminent domain prior to payment.[25] On June 1, 1920, in *United States* v.

[25] During the nineteenth century, and the first part of the twentieth, property condemned under federal condemnation statutes was not actually taken by the Government until payment had been made or offered, and this Court held the owner not entitled to interest pending the proceedings, in the absence of statutory provision. *Shoemaker* v. *United States*, 147 U. S. 282, 321. *Baumann* v. *Ross*, 167 U. S. 548, 598. Cf. *Danforth* v. *United States*, 308 U. S. 271, 283–284. The first general condemnation statute, the Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. 257–258, provided for acquisition of realty by proceedings by the Attorney General for condemnation in the federal courts, and conformed the "practice, pleadings, forms and modes of proceeding" to those "existing at the time in like causes in the courts of record of the State." Property was not taken in advance under this Act, but under the conformity provision certain lower courts followed state practice in allowing interest from a date prior to actual condemnation. See cases collected in *United States* v. *North American Co.*, 253 U. S. 330, 335. During and immediately prior to World War I, several emergency statutes provided for the taking of property prior to payment and placed the burden on the owner to sue for just compensation. See statutes cited in footnote 17, *supra*. It is under these acts that the cases involving the constitutional requirement of payment of interest have mainly arisen. See footnote 10,

North American Co., 253 U. S. 330, this Court, after reviewing the cases and doctrines, unanimously held that a claimant seeking just compensation in the Court of Claims, under the Tucker Act, for property previously taken by the Government, was not entitled to interest on the award from the time of taking. Mr. Justice Brandeis explained the lower federal court condemnation cases permitting recovery of interest on the ground that the applicable condemnation statute (e. g. Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. 257) "had provided in some form that the condemnation should be conducted according to the laws of the State in which the land was situated—and under the law of the State interest was recoverable [citing lower federal court cases]. These conformity provisions which relate only to the laws of States, can have no application to lands in Alaska; nor can they affect proceedings in the Court of Claims." 253 U. S., at 335. Section 177 of the Judicial Code was cited as barring an allowance of interest on suits in that court on an implied contract resulting from a taking. To the company's argument that interest was ordinarily allowed in state court condemna-

supra. The Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. 258a, provides a general mechanism for the Government's securing possession and use of realty prior to judicial determination of just compensation; it provides for interest at 6 per cent on the amount finally awarded, from the date of actual taking to the date of payment.

tion cases "not *qua* interest for default or delay in paying the value, but as the measure of compensation for the use and occupation during the period which precedes the passing of the title," this Court acknowledged that "this *may* be the theory on which interest should be allowed in compensation proceedings; and it *may* be that, even in the absence of the conformity provision referred to above, interest could be collected as a part of the just compensation in *condemnation proceedings brought by the Government.*" [Italics supplied.] But a claimant's suit for a taking, brought in the Court of Claims, was held to be a contractual action governed by Section 177. 253 U. S. at 336–338. It was not until the case of *Seaboard Air Line Railway* v. *United States,* 261 U. S. 299, was decided on March 5, 1923, that this Court, notwithstanding statutory silence, determined that the Constitution requires an award of interest in condemnation cases regardless of whether suit is brought by the Government or by the claimant.[26] And in *Jacobs* v. *United States,* 290 U. S. 13, decided in 1933, this doctrine was first actually applied to suits under

[26] The intervening case, *United States* v. *Rogers,* 255 U. S. 163, decided February 28, 1921, was a suit under the Act of August 1, 1888, *supra,* to condemn land in New Mexico. In that case this Court, after indicating doubt that the Conformity Act required that interest be awarded in accordance with the state law, upheld the award of interest without discussing the question whether the Fifth Amendment required that interest be included in the award.

the Tucker Act for a taking for which the United States was bound to make just compensation under the Fifth Amendment.[27] The contrary common understanding in 1920 is clearly shown by the express statement of the Court of Claims that "As a matter of law, this court in ordinary just compensation cases prior to the decision of the Supreme Court in the *Seaboard Air Line* case was of the opinion that under section 177 of the Judicial Code interest could not be included in the judgment. The *Seaboard Air Line case*, 261 U. S. 299, was decided by the Supreme Court March 5, 1923, and since then this court has included interest." *Willard R. Cook & Co., Inc.* v. *United States*, 80 C. Cls. 708, 711–712 (1935).[28] Cf. *Hutchison* v. *United States*, 57 C. Cls. 517, decided October 16, 1922.

Thus, it is plain that at the time of the adoption of the Military Academy Appropriation Act, 1921,

[27] The Court of Claims was long averse to granting interest in cases of implied contracts arising out of a taking, except in cases under the special wartime requisition statutes. In *Booth & Co.* v. *United States*, 61 C. Cls. 805 (1926); *Liggett & Myers Tobacco Co.* v. *United States*, 61 C. Cls. 693, reversed 274 U. S. 215; and *International Harvester Co.* v. *United States*, 72 C. Cls. 707, 719 (1931) interest was denied.

[28] The plaintiff's property had been requisitioned in 1917, and it brought suit for just compensation in 1918. The Court of Claims made an award but did not include interest. *Willard R. Cook & Co., Inc.* v. *United States*, 55 C. Cls. 537, decided June 18, 1920, no opinion. The sum awarded by the court was paid by the Government. Fourteen years later, the plaintiff brought suit for interest. The petition was dismissed.

in March 1920, the words "just compensation" were not universally understood to include interest, even in eminent domain cases. Indeed, in suits under the Tucker Act the rulings at that time excluded interest entirely. In using the words in the 1920 Act, Congress certainly did not incorporate the rules later laid down by this Court; the Congress legislated in the light of the then existing doctrine which, as we have shown, would have denied respondent's claim even if there had been an eminent domain taking. Here, where the requirements of the Fifth Amendment do not compel the Court to read a bare statutory provision for "just compensation" as including interest in order to hold the statute constitutional. (cf. *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 304; *Jacobs* v. *United States*, 290 U. S. 13, 17; *Smyth* v. *United States*, 302 U. S. 329, 353), the judicial connotation of the term, which prevailed at the time of the statutory enactment, should be imported into the act, rather than a later gloss.

D. THE ESTABLISHED PRESUMPTION IS THAT NON-EMINENT DOMAIN STATUTES INTEND TO BAR INTEREST UNLESS CONGRESS EXPRESSLY PROVIDES TO THE CONTRARY

It is a salutary rule, long followed by this Court, to assume that Congress has not lightly waived the "traditional immunity of the Government from the burden of interest," and to require of the claimant a clear showing of legislative intention to allow interest accruing prior to judg-

ment. In nonconstitutional matters, the rule denying interest has been applied "rigorously" and constitutes one of the "hardships from which, with rare exceptions [citing cases], Congress has been unwilling to relieve those who either voluntarily deal with the Government or are otherwise affected by its acts." *United States* v. *North American Co.*, 253 U. S. 330, 336. Section 177 (a) of the Judicial Code establishes this principle as the general rule, and exceptions from its scope must be found in special statutes.

But allowance of interest in non-eminent domain matters is a "matter of grace" on the part of Congress (*Hind* v. *United States*, 70 C. Cls. 288, 293; *Richmond, Fredericksburg & Potomac Railroad Co.* v. *United States*, 95 C. Cls. 244, 259), and it will be denied by the courts unless "expressly" or "specifically" authorized in a relevant special statute. *Tillson* v. *United States*, 100 U. S. 43, 46; *United States ex rel. Angarica* v. *Bayard*, 127 U. S. 251, 260; *Cherokee Nation* v. *United States*, 270 U. S. 476, 487; *Boston Sand Co.* v. *United States*, 278 U. S. 41, 47; *United States* v. *Goltra*, 312 U. S. 203, 207. Various special acts which have been claimed to authorize interest have all been found wanting. The statute in the *Tillson* case empowered the court to investigate the claim and "ascertain, determine, and adjudge the amount equitably due"; in *Harvey* v. *United States*, 113 U. S. 243, 249, the Court was authorized, "according to the rules and principles of equity juris-

prudence, in its judicial discretion," to "reform said contract and render such judgment as justice and right between the claimants and the said government may require" (see *Harvey* v. *United States,* 105 U. S. 671, at 680); in the *Boston Sand Co.* case, the special act empowered the court to adjudicate a collision case and to "decree for the amount of the legal damages * * * upon the same principle and measure of liability with costs as in like cases * * * between private parties"; in the *Goltra* case the insufficient words were "just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, * * * by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States." Similarly, the Attorneys General have consistently ruled that interest should not be paid unless the statute declares in express terms for its allowance. 1 Op. Atty. Gen. 268; 3 Op. Atty. Gen. 635, 639; 7 Op. Atty. Gen. 523, 525; 9 Op. Atty. Gen. 57, 59; 9 Op. Atty. Gen. 449, 450. Where Congress has desired to provide for interest, it has made its intention unmistakable. See 7 Op. Atty. Gen. 523; cf. Contract Settlement Act of 1944, 58 Stat. 649, 654, Sec. 6 (f), 41 U. S. C., Supp. V, 106 (f); Judicial Code, Section 177, 28 U. S. C. 284.

The presumption which this history illustrates should resolve any doubt in the instant case in favor of the Government.

In speaking of just compensation, eminent domain decisions, texts, and statutes universally speak of compensation *for* the property taken. Thus far in our argument, we have assumed that both the instant statute and lease were similarly phrased in terms of just compensation for the hotel. But the language which the Congress and the Secretary of War actually employed is "just compensation * * * *for the construction* of said hotel, appurtenances, and equipments." [Italics supplied.] In the court below, the Government agreed, in discussing the standard for computing the award, that these words were not free from ambiguity and presented a difficult problem of construction. But whatever the proper interpretation, it is clear that the italicized phrase differs significantly from the normal eminent domain language, and therefore the force of respondent's contention that interest must be included, *which rests solely on the identity of wording,* is seriously weakened by this admitted departure in terminology.

E. THE LEASE DOES NOT PROVIDE FOR PAYMENT OF INTEREST, EITHER EXPRESSLY OR BY IMPLICATION

The lease does not itself stipulate for the payment of interest, either expressly (as Section 177 (a) requires for an allowance of interest by the Court of Claims) or even by implication. Interest is nowhere mentioned in the agreement, and the contract provisions which relate to com-

pensation do not suggest any intention to provide it. At the expiration of the fifty-year term, or on cancellation of the lease by the Secretary of War, title to the hotel "shall pass at once to the United States," subject to the provisions for the payment of "just compensation" therefor (R. 10). Three separate clauses deal with the occasions for the payment of the compensation: (1) at the expiration of the fifty-year term; (2) on annulment of the lease by the Secretary of War for the lessee's failure to observe the covenants and conditions of the lease or the rules and regulations promulgated by the Superintendent under the lease; and (3) on termination of the lease by the lessee because of the erection of another hotel on the West Point reservation (R. 11–12). In each case, the words of the statute are followed, and "just compensation * * * for the construction of said hotel appurtenances and equipments" is to be made (R. 11–12).[29] Since, as we

[29] In the clause governing compensation on termination of the lease by the expiration of the fifty-year term, the lease does not follow the exact wording of the Act of March 30, 1920. The statute provides that the lease "* * * shall also provide for just compensation to the lessees for the construction of said hotel, appurtenances, and equipments, to be paid to said lessees at the termination of said lease." The lease provides that "just compensation shall be made to the party of the second part, or his assigns, for the construction of said hotel appurtenances and equipments which may then be upon the demised premises" (R. 11). We do not believe that the addition of the words "which may then be upon the demised premises" has any significance for the issue here pre-

have shown, the Act does not itself direct the payment of interest, the simple reiteration of the statutory formula, without more, cannot be read as stipulating for the allowance of interest. Especially so since, as in the instant case, "just compensation * * * for the construction" is to be paid on annulment of the lease because of an uncured breach by the lessee. Unless required to do so by the Constitution or by statute, the Government would hardly agree to pay full eminent domain compensation, including interest, where the lessee's breach is so gross that the Government finds it advisable or necessary to annul the agreements and take over the hotel. In such a case, the lessee's own fault having precipitated the premature take-over and necessitated the immediate determination of the compensation award, it would surely be unfair to impose upon the Government interest charges during the time it would take to compute the amount. If interest represents payment for the detention of the money value of the property at the time of the default (cf. *Boston Sand Co.* v. *United States*, 278 U. S. 41), the lessee should certainly be denied gain on the sum during this period; and if interest be thought to be the "measure of compensation for the use and occupation during the

---

sented. In any event, we are here concerned with the clause governing compensation on annulment of the lease by the Secretary for the lessee's failure to observe its conditions, and that clause follows the statute exactly (R. 11).

period which precedes the passing of the title" (*United States* v. *North American Co.*, 253 U. S. 330, 337), the lessee has neither legal claim, since the lease clearly passed the title to the Government immediately on annulment, nor equitable claim, since its default occasioned the delay in payment.[39] It is sufficient to note, once again (see *supra*, pp. 8-9), that although respondent has studiously ignored the actual transactions leading up to its demand for just compensation, its breach of the covenant to operate the hotel caused the Secretary of War to annul the agreement in accordance with its terms (R. 11, 17, 29–30).

In its Brief in Opposition to the Petition for a Writ of Certiorari (p. 9), respondent charges the Government with having changed theories as to the meaning of "just compensation," between the time of the judgment below and the filing of the petition in this Court. But there has been no change in the Government's position. In the Court of Claims, the Government argued for a measure of compensation based on "fair value in March 1943," a concept drawn largely from the eminent domain use of "just compensation;" this fair

[39] In eminent domain proceedings, the claimant is not entitled to interest on amounts offered by the Government or paid into court at the time of taking, which are later judicially determined to be all that "just compensation" requires. *Luckenbach Steamship Co.* v. *United States*, 272 U. S. 533, 542; Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, Sec. 1, 40 U. S. C. 258a.

value of the hotel and furnishings was placed by the Government at $524,000.[31] At the same time, the Government urged that respondent was not entitled to interest since the statutory use of "just compensation" was intended to adopt the eminent domain concept only for valuation purposes and not to allow interest where no actual "taking" was involved. Respondent, on the other hand, contended that the statute was intended to award original costs as a measure of just compensation, and it denied the applicability of the usual eminent domain measures of fair value. It asked for judgment in the amount of $1,927,045.08. The lower court, stating that "just compensation * * * for the construction of this hotel is not subject to any nice calculation," found it to be $820,682 (R. 37, 31–32).[32] The court took into consideration "all relevant facts and circumstances, including the approximate cost of original construction," and "the cost of reproduction as of March 10, 1943, less depreciation" (R. 31, 37), but relied mainly on "sound value, that is, reconstruction new less depreciation" (R. 37). Just compensation for the equipment was found to be $47,000 (R. 32),[33] and the total

[31] The original cost was said by the Government not to exceed $1,142,707.04.

[32] Judge Whitaker thought that $500,000 "would be liberal compensation" (R. 38).

[33] The court found that "There was a market for the hotel equipment. The application of so-called 'sound' value to the equipmenf need not be resorted to" (R. 37; cf. R. 31).

award amounted to $867,682.00 plus interest (R. 32, 38).

Since neither party has sought review of the lower court's award of $867,682, we are not now concerned whether the correct method of calculation was adopted below or the correct figure adjudged, and the Government is not charged in this Court with defending the award. The sole issue here is the allowance of interest. On that issue we believe that the Court of Claims plainly erred.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed to the extent that it includes an allowance for interest.

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No. 106

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

UNITED STATES, PETITIONER

v.

THE THAYER-WEST POINT HOTEL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF IN OPPOSITION

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Opinion Below.

The opinion of the Court of Claims and the Findings of Fact and Conclusions of Law are set forth in the record (R. 21-38). The opinion has been reported in *Vol. 64 Fed. Supp. 565.*

Jurisdiction.

The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925 as amended 28 U. S. C. 288(b).

The judgment of the Court of Claims was entered on March 4, 1946 (R. 38).

Statement.

On March 10, 1943, the United States Government took over the Hotel and all the equipment owned and then being operated by the respondent The Thayer-West Point Hotel Company (Finding 19, R. 29). The Hotel was

located on the Military Reservation at West Point and had been built and was being operated at the time of its taking under a fifty-year term lease with the Government. It had been built and was operated entirely at the expense of the lessee and his successors.

The term of the lease did not expire until October 17, 1974 (R. 6). The lease, however, contemplated and provided for a possible termination prior to the expiration of the term, and in such event it provided "just compensation shall be made to the party of the second part or his assigns for the construction of said Hotel, appurtenances and equipments" (R. 11). This was in accordance with the statute pursuant to which the lease had been entered into between the Secretary of War and the lessee by Act of March 30, 1920 (41 Stat. 538, 548) which reads as follows:

> "That the Secretary of War is hereby authorized to lease land on the United States Military Reservation at West Point, for a term of not exceeding fifty years, to any corporation, company, or individual, upon which to erect a hotel, and all other necessary buildings in connection therewith, in accordance with plans and specifications submitted to and recommended by the Superintendent of the Military Academy, and approved by the Secretary of War. Said lease shall contain such conditions, terms, reservations and covenants, as may be agreed upon and shall also provide for just compensation to the lessees for the construction of said hotel, appurtenances, and equipments, to be paid to said lessees at the termination of said lease."*

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* The provision of the lease referred to in the note in the petitioner's brief (p. 13) only applied to the termination of the lease by expiration of the term, but was not applicable to the termination of the lease prior to expiration. At the time of the taking by the Government and the consequent termination of the lease, it had 31 years to run.

The Hotel Company, shortly after the taking of its property by the Government, brought this action in the Court of Claims to recover "just compensation for the construction of said Hotel, appurtenances and equipments." The action was brought under the authority of Section 145 of the Judicial Code, which was formerly known as the Tucker Act, and which provides in part as follows:

> "Jurisdiction—The Court of Claims shall have jurisdiction to hear and determine the following matters: (1) Claims against United States. First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable: * * *"

The Court of Claims found "a fair and reasonable value" of the Hotel and equipment as of March 10, 1943, the date of the taking, to be $867,682.00 (R. 32, Finding 27).

No review is sought by the Petitioner herein of that finding.

The Court of Claims found, in addition to the said amount constituting the fair and reasonable value of the Hotel and equipment on March 10, 1943, that an additional amount should be paid represented by a computation of four per cent (4%) per annum on the fair and reasonable value from March 10, 1943, until the date of payment in order to give "just compensation".

In its conclusion of law the Court below expressly stated that this four per cent (4%) per annum was awarded "not as interest but as a part of just compensation" (R. 32).

At all times since the date of taking the Government has continued in possession and has operated the Hotel and its equipment (R. 29).

During this period the first mortgage on the Hotel property is outstanding and interest thereon is accruing and unpaid.

Argument.

The Petitioner has specified four errors which it seeks to review but which may be resolved into this one narrow question:

Whether the Court of Claims was empowered to award an additional sum, measured by way of computation of interest, to cover the period from the date of taking to the date of payment, in order to give the Hotel Company "just compensation" as provided by the statute and the lease.

POINT I.

The question whether the Court of Claims may make an allowance of interest not as interest but as "just compensation" has been definitely settled by several decisions of this Court.

Since 1923 there have been at least six decisions by this Court supporting the allowance of interest in the Court of Claims when the award called for "just compensation."

In *Brooks-Scanlon* v. *United States*, 265 U. S. 106, a ship under process of construction was requisitioned by the Government under an act authorizing the payment of just compensation but it made no provision for interest. This Court in holding that interest could be allowed said:

> "It is settled by the decisions of this Court that just compensation is the value of the property taken at the time of the taking. And if the taking precedes the payment of compensation, the owner is entitled to such addition to the value at the time of the taking as will produce the full equivalent of such value paid contemporaneously. Interest at a proper rate is a good measure of the amount to be added."

Then came the decision in *Phelps* v. *United States,* 274 U. S. 341, in which this Court thoroughly considered the question of interest in the Court of Claims. In that case the Court of Claims rendered an award for the value of the use of a pier on which petitioner had a lease and which was requisitioned by the Secretary of War under an Act of Congress. The petitioner vacated the property and the United States took possession. Petitioner contended that to the value of the property found as of the day of taking, should be added such sum as would produce the equivalent of the use of the lease or property paid contemporaneously and that interest at a reasonable rate from the date of the taking to the time of payment is a good measure of the amount to be added in order to make "just compensation". It is noted that the action in the Court of Claims was brought under Sec. 145 of the Judicial Code. The Court of Claims refused to allow interest. This Court reversed the Court of Claims and held that a judgment in 1926 for the value of the property found in 1918 was not sufficient to constitute just compensation and said:

> "The Government's obligation is to put owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking."

Almost simultaneously with this decision in the *Phelps* case came the decision in *Liggett & Meyer* v. *United States*, 274 U. S. 215 where this Court reversed the Court of Claims for refusing to allow interest as additional compensation. The Government had ordered tobacco under an act empowering the President to requisition war material and provided that "just compensation" would be paid. There was no mention in the Act of interest. This Court directly held that interest as an additional amount was allowable.

In *United States* v. *Creek Nation*, 295 U. S. 103, and *Shoshone Tribe* v. *United States*, 299 U. S. 476, both Court of Claims cases, interest was allowed where just compensation was awarded for the taking of lands. This Court held that the value of the land at the time of taking was not just compensation but that interest at a reasonable rate is a suitable measure by which to ascertain an additional amount.

This Court refused to allow interest in *Smyth* v. *United States*, 302 U. S. 329, a Court of Claims case, where the United States had redeemed certain of its bonds and suits were brought in the Court of Claims to recover on the interest coupons attached to the bonds. There was no question of "just compensation" in the case and the Court reaffirmed the rule that in the absence of contract or statute evincing a contrary intention interest does not run upon claims against the Government.

Then came the decision of this Court in *United States* v. *Goltra*, 312 U. S. 203, on which Petitioner seems to rely. The Court of Claims allowed interest which this Court reversed but the distinctions drawn by this Court plainly indicate that where there is a *tortious* taking interest will not be allowed as distinguished from a taking which is authorized and calls for "just compensation". This

Court showed that while there had been a tortious taking in *United States* v. *Creek Nation, supra,* and *Shoshone Tribe* v. *United States, supra,* there had been a ratification by Congress of the taking thus permitting allowance of interest, whereas in the *Goltra* case there was no such ratification.

The clear implication of the *Goltra* decision is that if there had not been a tortious taking the interest allowance would have been proper.*

POINT II.

Section 177 of the Judicial Code is not applicable to this case as the Court of Claims expressly held that it was making no award of interest as "interest".

That section does not apply to a "just compensation" case. Its inapplicability to a case like this was recognized by this Court in *Phelps* v. *United States, supra,* where it said in its opinion:

> "Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the purpose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution."

As a well established general rule, interest is not allowed on claims against the Government. But in "just compensation" cases where an owner's property is taken over with authority by the Government, this Court has always recognized the propriety of awarding an additional amount

* United States v. North American Company 253 U. S. 330, cited by Petitioner was also a case of tortious taking and was so distinguished in later decisions.

measured by interest. (*Jacobs* v. *United States*, 290 U. S. 13; *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299.)

The alleged "tendency" of the Court of Claims, which petitioner decries (p. 13), to allow interest as a part of just compensation is amply supported by the decisions of this Court.*

POINT III.

Where both the statute and the contract expressly provide for the payment of "just compensation" when the Government takes over the property, there can be no plausible distinction between that kind of just compensation and the just compensation which is intended to be given under the Fifth Amendment.

The petitioner concedes in its brief that "an award of damages under the Fifth Amendment for the taking of property includes interest from the date of taking if payment be delayed" (p. 11). Petitioner argues, however, that when Congress uses the words "just compensation" in the Statute, and when those same words were employed in the lease with the United States, they were not intended to be

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* The petition for a writ of certiorari in *New York Rayon Company* v. *United States* cited by Petitioner, page 13, has no bearing on this case and is not analogous to it in any way whatsoever. It is reported at 64 *Fed Supp.* 684. Suits were brought on two judgments issued by the United States Customs Court where payments of the judgments had been delayed because of the refusal of the Government to pay on the ground that the payee corporation had been dissolved. There was no contract or statute providing for the payment of "just compensation" involved in the case.

used in the sense in which they are used in the Fifth Amendment.*

The Petitioner cites no decisions which sustain this contention. We think that the decisions of this Court which we have cited establish the rule as above stated under our point.

We are unable to find any support for the Petitioner's statement in its brief that there was no element of "taking" in this case when the 19th Finding of Fact (R. 29) of the Court below reads:

> " * * * the Secretary of War for and in behalf of the defendant, acting through its agents and representatives and pursuant to the provisions of the lease, took over possession and occupation and management of the said hotel and all its properties, appurtenances, and equipment, and has ever since continued in possession, management, operation, and control of the same."

What constitutes a "taking" if this is not one?**

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* Before the Court of Claims the Government took a contrary position. It said in its brief, (p. 173) "We submit that when Congress uses the words 'just compensation' in an Act such as the Act of March 30, 1920, it must be considered, in the absence of a very strong showing of contrary intent, to have used them in the sense of eminent domain. . . . As we shall show, the use of the words 'just compensation' in the sense of eminent domain value is appropriate to the situation involved, and the legislative history of the Act of March 30, 1920, while admittedly not conclusive one way or another, certainly does not help plaintiff overcome the presumption that Congress did use those words in the eminent domain sense."

** The Government heretofore recognized a "taking" because it commenced a proceeding in condemnation in the United States District Court for the Southern District of New York (R. 30). It is also worthy of note that the Secretary of War considered this claim justiciable in a condemnation proceeding (R. 17).

There is nothing in the lease which required the Government as a matter of *contract* to take over the Hotel property. Its obligation was to pay "just compensation" *when* it took the property and when it so terminated the lease. There had to be a "taking" in order to terminate the lease before the expiration of its term.

The words "just compensation" have come to have a definite well established meaning under the decisions of this Court to the effect that the value of the thing taken from the time of taking to the date of payment, with an added amount to make the parties whole, is what constitutes "just compensation".

Conclusion.

For the foregoing reasons, we respectfully submit that the petition herein for a writ of certiorari should be denied.

Ernest J. Ellenwood,
John S. Shedden,
Counsel for Respondent.

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No. 106

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

UNITED STATES, PETITIONER

v.

THE THAYER-WEST POINT HOTEL COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR THE RESPONDENT.

ERNEST J. ELLENWOOD,
JOHN S. SHEDDEN,
Of Counsel for Respondent.

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No. 106.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

UNITED STATES, PETITIONER,

v.

THE THAYER-WEST POINT HOTEL COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR THE RESPONDENT.

Opinion Below.

The Opinion of the Court of Claims (R. 32-38) has not yet been officially reported. The Findings of Fact and Conclusions of Law are set forth in the record (R. 22-32).

Jurisdiction.

The judgment of the Court of Claims was entered on March 4, 1946 (R. 38). The petition for a writ of certiorari was granted on October 14, 1946 (R. 39).

The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended, 28 U. S. C. 288(b).

Question Presented on This Appeal.

Where an Act of Congress provided that, upon the termination of a 50-year lease by the Government, as lessor,

of land on which a hotel was constructed, and operated by the lessee pursuant to the Act, the lessee was to be paid "just compensation for the construction of said hotel, appurtenances and equipment", and where the Government took over possession of the hotel approximately 31 years prior to the expiration of the term of the lease, and terminated the lease, was the Court of Claims empowered to award a sum additional to the "fair and reasonable value" of the hotel, appurtenances and equipment as of the date when the Government took possession, computed at 4% per annum thereon from the date when the Government took the property down to the date of payment "not as interest but as a part of just compensation"?

Statutes Involved.

1. Act of March 30, 1920, 41 Stat. 538, 548, provides:

> "That the Secretary of War is hereby authorized to lease land on the United States Military Reservation at West Point, for a term of not exceeding fifty years, to any corporation, company, or individual, upon which to erect a hotel, and all other necessary buildings in connection therewith in accordance with plans and specifications submitted to and recommended by the Superintendent of the Military Academy, and approved by the Secretary of War. Said lease shall contain such conditions, terms, reservations and covenants, as may be agreed upon and shall also provide for just compensation to the lessees for the construction of said hotel, appurtenances, and equipments, to be paid to said lessees at the termination of said lease."

2. Section 177(a) of the Judicial Code, 28 U. S. C. 284, provides in part as follows:

"(a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, * * *."

Statement of the Case.

Acting under authority of the Act of March 30, 1920, the Government on October 17, 1924, by its Secretary of War, entered into a lease for a term of fifty years with Herbert Williams (R. 6-14). As permitted by the express provisions of the lease Williams assigned the lease to The Thayer-West Point Hotel Corporation, a New York Corporation (not the Respondent herein). That corporation caused to be constructed at its own expense on the leased land at West Point, in accordance with the terms of the lease, a hotel known as The Thayer-West Point Hotel, and fully furnished and equipped same.

The corporation occupied the hotel and commenced its operation in June 1926. Final construction as required under the plans was completed in September of 1926 (R. 24).

As this appeal involves the construction of a statute which concerns compensation for this hotel and equipment, it is pertinent to consider the type and character of the property.

The hotel was structurally and economically an unusual, if not unique, type of hotel. A witness for the Government testified that with one exception it is the only hotel of its kind in the country. The land on which the hotel was built is part of the United States Military Reservation at West Point known as the West Point Military Academy. The hotel was designed and built and operated primarily to serve the interests of the United States Army officers and

cadets and their visitors at West Point. It was built according to plans and specifications which were required to be submitted to and recommended by the Superintendent of the Military Academy and approved by the Secretary of War.

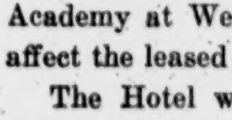
The Government has furnished no money whatsoever for the construction of the hotel, its equipment or its maintenance, but it was built, managed and conducted under the inspection of agents and representatives of the Government.

It was subject at all times to most unusual if not severe restrictions imposed by the Government. For instance, its rates for meals and board had to be approved by the Superintendent at West Point. Discounts from the rates were required to be given by the Hotel to the Board of Visitors and Officers of the United States making tours of inspection, to parents and guardians of cadets, to officers and their dependents on duty at the Post, to officers and dependents connected with athletic teams. It is therefore perceived that the Hotel was required to give discounts to a large proportion of its clientele (R. 31). The insurance placed on the hotel had to be satisfactory to the Superintendent, and the hotel was required to be open every day except at such times as permission to close was given by the Superintendent.

The hotel and buildings were required to be used exclusively for hotel purposes, but if display rooms were maintained, which in large commercial hotels are an important source of revenue, at The Thayer-West Point Hotel such rooms had to be for the display of merc' .ndise for sale to officers and cadets. Water, electricity, ice, sewage and bus transportation are all mentioned in the lease and all regulated more or less by the West Point Superintendent.

Probably the severest restriction affecting the Hotel was the one by which it had to agree to observe "all rules and regulations now established or which may hereafter be established by the Superintendent of the Military Academy at West Point so far as the same apply to or affect the leased premises".[1]

The Hotel was required to keep the "premises, the hotel, appurtenances, and equipment in good repair at all times * * *." The Superintendent or an officer designated by him "shall at any and all times have access to said premises to make such inspection as he may deem necessary" (R. 12, 31).



[illegible] the plans for the construction of the hotel there were unusual requirements imposed by the Government. In addition to 225 sleeping rooms there was a large ballroom and lobby entirely out of proportion to the size of the hotel. From an economic standpoint this would be waste space most of the time. Special suite were built and furnished called the Presidential Suite, the Vice-Presidential Suite, and the Secretary of War Suite (R. 24).

The lease provided that the lessee could not sublet or

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[1] As an illustration of the restraint under which the hotel carried on its operations, an examination of *Kelly as Trustee in Bankruptcy of The Thayer West Point Hotel Corporation* v. *U. S.*, 69 Ct. Cls. 220 is enlightening. In that case this same lease was before the Court of Claims for interpretation at the instance of the old corporation. Kelly as Trustee was claiming an alleged constructive eviction and therefore a termination of the lease. It appeared therein that about a year after the hotel opened for operation, the Superintendent of the Military Academy closed the road to through traffic going through the reservation, which was the regular accessible route to follow in order to reach the hotel, because the traffic on the roadway interfered with the operations of the Academy. The Court of Claims found that this restriction affected the business of the hotel. Nevertheless, the diversion of traffic as ordered by the Superintendent of the Military Academy was authorized and upheld, and constructive eviction was denied.

lease the hotel or any portion thereof, nor assign the lease without the written approval of the Superintendent of the Military Academy (R. 12).

We mention these matters to show that no transient or commercial hotel property was comparable in any way to this property, nor could a transient or commercial hotel be built and operated profitably under such conditions. It is therefore reasonable and proper to assume that these matters were in contemplation of Congress when the Statute was passed authorizing the negotiation of such a lease. Indeed the legislative history of the Act as we shall hereafter show expressly indicates the intention of Congress to provide for these conditions.

In 1925, prior to the completion of the construction of the hotel, the Corporation issued and sold to the public $1,000,000.00 principal amount of its 6½% First Mortgage Bonds to raise funds for the construction and equipment of the hotel. This bond issue was secured by mortgage of the leasehold and the building and personal property at West Point. Later there was also issued by the Corporation and sold $500,000 principal amount of 7% General Mortgage Bonds secured by the same properties as the first mortgage bonds, but subordinate in lien (R. 24).

In 1927 the hotel Corporation made certain defaults under its first mortgage and as a result the mortgage was foreclosed. The leasehold and all the hotel properties were subsequently sold at a mortgage foreclosure sale and bid in by a protective committee of the first mortgage bondholders representing $879,400 face value of the first mortgage bonds. In addition to this amount of bonds, which stood behind the purchase, the committee paid $25,000 in cash upon making its bid at the sale (R. 25).

Thereupon The Thayer-West Point Hotel Company (hereinafter called the "Company"), respondent herein, was organized by the committee of the bondholders as a Delaware corporation, and took over by proper deeds of conveyance the ownership and operation of the leasehold and the hotel property with the consent and approval of the Superintendent of the Military Academy at West Point. The company in order to raise working capital and pay the cash bid at the mortgage foreclosure sale gave its first mortgage for $125,000, and issued to and exchanged with the old first mortgage bondholders of the hotel corporation one $50 6% Income Bond and one share of its Common capital stock for each $100 of the original 6½% First Mortgage Bonds. The result of this transaction was that the entire income bond issue of the Company, amounting to $439,700, and the entire issued and outstanding stock of the Company, amounting to 8,794 shares, are presently outstanding and stand in place of the original $879,400 First Mortgage bonds which came into the foreclosure and reorganization proceedings. The remaining old First Mortgage bondholders holding $120,600 bonds who did not join in the reorganization, were paid proportionately small amounts out of the foreclosure cash bid of $25,000.

The first mortgage of $125,000 is also presently outstanding in the principal amount of $115,000 with interest at 6% unpaid thereon from January 1, 1942 (R. 25-26).

The new Company, Respondent herein, commenced operation and management of the hotel properties in January 1931, and continued down to March 10, 1943. On that date the Government took possession of the hotel and all its properties, appurtenances, and equipment, and commenced immediately the operation and management of the properties, which has continued down to date (R. 27-29). This

came about after an exchange of letters, which were obviously the result of conditions apparently brought about by the war. On January 5, 1943 the Hotel Company wrote the Secretary of War as follows:

"93 Exchange Street,
Portland, Maine.

January 5, 1943.

Attention of Corps of Engineers

Hon. Henry L. Stimson,
Secretary of War,
Washington, D. C.

Dear Sir:

Under the Act approved March 30, 1920 (41 Stat. 548), the Secretary of War, on October 17, 1924, leased a parcel of land on the United States Military Reservation at West Point for a period of fifty years for the purpose of constructing thereon a hotel and all other necessary buildings in accordance with plans to be approved by the Superintendent of the Military Academy. The assigns of the lessee constructed a hotel and necessary buildings known as the Thayer-West Point Hotel, which is owned and operated by the Thayer-West Point Hotel Company.

Due to existing conditions which are beyond the control of the stockholders and directors of The Thayer-West Point Hotel Company, and the military authorities at West Point, and which were not contemplated at the time the said lease was executed, it is now impossible to operate the Hotel as previously conducted. Such conditions will necessarily force a curtailment in operation unsatisfactory to the military authorities at West Point, and perhaps the closing of the Hotel in accordance with the terms of the lease. If the Hotel should fall into the hands of outside interests through the foreclosure of the first mortgage thereon, the bondholders would be deprived of any return on their original investment and the operation of the Hotel would be conducted to the detriment of the Officers, the Cadets and their friends. Under the circumstances the Hotel Company considers it desirable that in order to avoid a curtailment of the operation or a possible closing down of the

hotel, or the operation of the hotel to the detriment of the Officers, the Cadets and others, the properties should be owned and operated by the Government.

The lease provides that it may be cancelled at any time by the Secretary of War should the second party thereto fail to observe all the covenants and conditions of the lease or any of the rules and regulations promulgated by the Superintendent under the said lease, and that the Secretary of War may declare the lease forfeited for such failure and thereupon just compensation shall be made to the second party to said lease or his assigns for the construction of the said Hotel, appurtenances and equipment.

Inasmuch as our holdings and the value thereof depend upon a contract, authorized by and embodied in the lease, it is suggested that the method of cancellation provided for in the lease, if adopted, will protect all parties, and we therefore suggest the following procedure, under the lease, which will result in the acquisition by the Government of the properties in question.

In order that the officers and directors of The Thayer-West Point Hotel Company may fully protect the rights of its stockholders and its bondholders, we are writing to you to inquire if you will write us a letter, stating that in the event default is made by the Company under the provisions of the lease, you will forthwith thereafter declare the lease forfeited and take title to the building erected on the leased property and the appurtenances and equipments therein (except such furniture and furnishings as are supplied by guests for their own use) in accordance with the provisions of the lease to the end that the Company shall be entitled to the just compensation, as provided in the lease. The letter should also indicate that the forfeiture, will not result in any action by the Government other than to effect the conveyance of the Hotel property to the Government and to make just compensation therefor, as provided in the lease.

This action is to be based upon our delivery to the Superintendent at West Point of notice of the default in advance of the time when it will occur, and also upon our deli ry to the Superintendent of a waiver by this Company and by the present holder of the mortgage on the Hotel of notice of any claim made by you of omission or failure growing out of such default,

and a waiver of reasonable opportunity of compliance by the mortgagee to correct such omission or failure of the terms of the lease, and of a further waiver of any time to be given by the Superintendent of the West Point Academy to correct the omissions or failure caused by such default and to comply with any requirements of the Superintendent in that regard.

This communication is not intended and should not be construed as a notice of default on our part. However, it is urgently requested that, with a view to relieving the acute situation which exists with respect to the maintenance and operation of the hotel, consideration be given to the possibility of Government ownership as contemplated by the terms and provisions of the lease.

Your early advice in this matter will be appreciated.

Yours truly,

THE THAYER-WEST POINT HOTEL COMPANY

By PHILLIPS M. PAYSON
PHILLIPS M. PAYSON,
President."

On February 5, 1943 the Secretary of War replied as follows:

"War Department
Washington

Feb. 5, 1943.

The Thayer-West Point Hotel Company
West Point, New York.

Gentlemen:

Receipt is acknowledged of your letter dated January 5, 1943, presenting the situation with respect to the maintenance and operation of the Thayer-West Point Hotel and appurtenances now owned by your Company and located on lands leased from the United States within the United States Military Reservation at West Point.

The lease entered into between your predecessors and the United States pursuant to an Act of Congress approved March 30, 1920 (41 Stat. 548), provides in substance that certain premises owned by the United States are leased for a period of fifty years commencing October 17, 1924, for the purpose of erecting thereon a hotel and other buildings necessary for its operation. The buildings thereon are the property of your Company and upon termination of the lease the buildings become the property of the United States, for which the United States is required to pay just compensation. The lease makes provision for annulment should the lessee fail to observe the covenants and conditions of the lease or the rules and regulations promulgated by the Superintendent of the Military Academy. Before termination of the lease by annulment, the lease provides that due notice must be given to the lessee, mortgagee and trustee of any mortgage, and a reasonable opportunity afforded to comply with the requirements of the United States.

Your letter indicates the necessity for a curtailment of the operation of the hotel by your Company or a possible closing of the hotel. In case of the closing of the hotel, it would be incumbent upon the Government to notify the lessee and other interested parties that such action constitutes a failure to observe the covenants and conditions of the lease and would be a sufficient cause for annulment of the lease. Such notice would of necessity give reasonable opportunity to the parties to comply with the terms and conditions of the lease before an annulment would be effective. If, however, the Hotel Company should notify the War Department that it intended to close the hotel on a given date, and accompanied such notice with waivers from the Company, the mortgagee, trustee of any mortgage and other interested parties, relieving the lessor of the obligation of giving notice and granting a reasonable time for compliance with the terms and conditions of the lease, then it would be the duty of the War Department to take possession of the property upon the date specified.

The statute (41 Stat. 548) provides that upon termination of the lease just compensation must be paid to the owners of the property and it will be necessary for the Government to comply with the statute.

Please be informed, therefore, that if you proceed as you have tentatively outlined in your letter, and forward a notice of default accompanied by proper waivers from all interested parties, it is the intention of the War Department to take the necessary action to declare the lease forfeited under its terms, to take possession of the building and appurtenances, and to institute condemnation proceedings for the purpose of clearing the title to the buildings, appurtenances and equipment, and of determining the just compensation to be paid to the owners in accordance with the statute.

Sincerely yours,

HENRY L. STIMSON,
Secretary of War."

Following the suggestions contained in the Secretary of War's letter, notice of default was given by the Hotel Company dated February 26, 1943. The waivers of notice referred to by the Secretary of War were also given by the Company (R. 29).

On March 10, 1943 the Government gave notice to the guests of the Hotel of the change of ownership and operation from the Hotel Company to the Government, and thereafter and on March 24, 1943 the Secretary of War served a formal notice of annulment of the lease which he stated was "in accordance with the terms and conditions of the aforesaid lease" (R. 30).

This date marked the termination of the lease. It would have not expired under its fifty year term until October 17, 1974.

Shortly thereafter, on April 19, 1943, the Hotel Company wrote the Secretary of War that it had become entitled to just compensation for the construction costs of the hotel, appurtenances and equipment and fixed a tentative

amount "for the purposes of discussion only" in the sum of $2,300,000. On May 19, 1943 the Hotel Company, not having had any reply from the Government, commenced this action in the Court of Claims. The next day, on May 20, 1943, the Government commenced a proceeding in the United States District Court for the Southern District of New York seeking a condemnation of the hotel properties,[2] and on May 21, 1943 at the same time wrote the Hotel Company that the just compensation would have to be determined by the Court (R. 30). The Hotel Company moved in the District Court to stay the condemnation proceedings on the ground that the Court of Claims had acquired prior jurisdiction. The motion was granted and the stay ordered (R. 30). No appeal from this order was taken.

The Judgment of the Court of Claims.

By its finding of fact (No. 27), the Court below found "the fair and reasonable value of the hotel and appurtenances as of March 10, 1943, the date possession of it was taken by the defendant, was $820,682.00." It further found in the same finding that "the fair and reasonable value of the equipment, including furniture and kitchen equipment, on March 10, 1943, was $47,000.00." The Court found that the total of these two values, amounting to $867,682.00 is "fair and reasonable compensation to the plaintiff as of

[2] These proceedings were brought, as alleged in the Government's petition, because it was necessary to acquire the property for military purposes under the authority of the Second War Powers Act approved March 27, 1942 (Public Law 507—77th Congress) and the Act of Congress approved August 18, 1890, 26 Stat. 316, as amended by the Acts of Congress approved July 2nd, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518; 50 U. S. C. Section 177).

March 10, 1943 for construction of the hotel, appurtenances and equipment."[3]

No objection or exception to these findings or to the judgment thereon has been made by the Government or by the Hotel Company.

The Court of Claims then found as a fact in the same finding that, in addition to the said total amount of fair and reasonable compensation as of March 10, 1943, there should be added thereto 4% per annum on the said total amount from March 10, 1943 until the date of payment, and the Court then found as a fact that this additional amount raised "the aggregate value of $867,682 so ascertained and determined to just compensation as of the date of payment".

The Court found this additional amount "not as interest but as a part of just compensation" (R. 31-32).

It is that part of the judgment awarding an additional sum to the date of payment to which the Government now objects and upon which this appeal is solely based.

In effect the Government's principal claim is that this additional amount is "interest" which is prohibited by Section 177 of the Judicial Code.

Summary of Respondent's Argument.

I. The additional amount awarded upon the facts in this case is not interest within the purposes or intention of

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[3] The Court of Claims found that the original cost of constructing the hotel and appurtenances was approximately $1,300,000 and that the cost of reproducing the hotel on March 10, 1943, would have been $1,138,160 not including the cost of landscaping or any allowance for interest during construction or charges for financing. In addition thereto the Court below found that the contract price of the furniture and equipment of the hotel was $296,743.03 of which $87,000 had been paid in connection herewith (R. 30-31).

Section 177 of the Judicial Code. From March 10, 1943 the Government has enjoyed the full use and benefit of respondent's properties while the respondent, completely out of possession,[4] is still incurring expenses in connection therewith and payment has not been made. The respondent is entitled to have the full equivalent of the value of the use of its property by the Government paid contemporaneously at the time when the Government took the property. It is entitled to be put in as good position pecuniarily as if the use of its property had not been taken. This is the fair and reasonable interpretation of the statutory provision authorizing the payment of "just compensation for the construction of the hotel, appurtenances and equipment". The Court of Claims in awarding an additional amount "not as interest but as part of just compensation" simply followed a method of computation approved many times by this Court to determine the full value of the property down to the date of payment.

II. Our right to full compensation to the date of payment does not depend upon whether this is an "eminent domain" case or upon any particular kind of "taking". The Government was under no obligation, contractual or otherwise, to take over this property and business. When it elected to do so, then the statute required it to pay "just compensation for the construction of the hotel, appurtenances and equipment" which fairly and reasonably means compensation to the date of payment.

III. At the time of the enactment of the Statute the words "just compensation" had a definite established mean-

[4]The Government says this is "during the time it would take to compute the amount" (p. 45).

ing of full value to the date of payment. Congress intended to make the lessee whole if and when its property was taken by the Government prior to the expiration of the term of the lease.

IV. The "fair and reasonable" value of the hotel properties on March 10, 1943 is not equivalent to "just compensation for the construction of the hotel, appurtenances and equipment". The Court of Claims properly recognized this distinction. If Congress had intended to provide a measure of damages limited to the "fair and reasonable" value of the hotel properties at the time when the Government took over possession of them, it would not have used the words "just compensation for the construction of the hotel, appurtenances and equipment".

Argument.

I.

The Court of Claims was empowered in fixing "just compensation for the construction of the hotel, appurtenances and equipment" to award an amount which represents the value of the use of the hotel properties from the time when the government took possession down to the time of payment.

Such additional amount is not interest within the purpose and intention of Section 177 of the Judicial Code. Interest is defined as the compensation for the use or forbearance of money. It is due for withholding a debt (33 *Corpus Juris* 178). The Court of Claims in its findings of fact and conclusions of law and judgment has made no award of such interest. It ruled properly that the Hotel

Company should be put in as good position pecuniarily as if the use of its property had not been taken. The Hotel Company was deprived of its property and business on March 10, 1943. Without any interruption whatsoever the Government took over that property and business and has been in complete possession and operation of it since that time. In the meantime the first mortgage of $115,000 remains unpaid with accumulating interest thereon. What compensation does the Company receive for that loss incurred while the Government enjoys the income from the property and payment for it is not made? How can it be reasonably said that compensation to the Company is "just" when the Government takes the Company's property on March 10, 1943, fixes its value as of that date, and then pays for it sometime in the indefinite future. Certainly that kind of compensation is not the equivalent of the use of the property paid contemporaneously with the date of taking, and makes, it seems to us, a travesty of the words "just compensation".

This Court has recognized similar situations in several cases, and, in sustaining or directing a similar award as made by the Court below herein, these cases definitely held that Section 177 of the Judicial Code is no bar.

In *Phelps* v. *United States*, 274 U. S. 341 this Court thoroughly considered the right of the Court of Claims to make an award similar to the instant case. In that case the Court of Claims rendered an award for the value of the use of the pier on which petitioner had a lease and which was taken by the Secretary of War under an Act of Congress. The petitioner vacated the property and the United States took possession. Petitioner contended that to the value of the property found as of the day of taking should

be added such sum as would produce the equivalent of the use of the lease or property, paid contemporaneously, and that interest at a reasonable rate from the date of the taking to the time of payment is a good *measure* of the amount in order to make just compensation. The Court of Claims refused to allow such additional amount. This Court reversed the Court of Claims and held that a judgment in 1926 for the value of the property found in 1918 was not sufficient to constitute just compensation. In this case this Court expressly held that Section 177 of the Judicial Code does not prohibit the inclusion of an additional amount in order to make just compensation, and that such amount is not a claim for interest.

The Government refers in its brief to the fact that the Statute which we are considering and the lease contained no express provision concerning the payment of interest. In *Brooks-Scanlon* v. *U. S.*, 265 U. S. 106; *Liggett & Meyer* v. *U. S.*, 274 U. S. 215; *U. S.* v. *Creek Nation*, 295 U. S. 103; *Shoshone Tribe* v. *U. S.*, 299 U. S. 476, all Court of Claims cases, no mention was made in the Statute under consideration of interest, and yet in all of them this Court held that where property was taken over by the Government and the possession by the Government preceded the payment of compensation, then the owner was entitled to the full equivalent of the value paid contemporaneously. The underlying principle of all these cases, as we read them, is that the additional amount allowed is not interest, but is a method of computing compensation by way of interest in order to give the property owner the full value of his property taken.

This principle is clearly sustained in the decision of this Court in *Waite* v. *U. S.*, 282 U. S. 508. A suit was brought to recover for the unlicensed use of a patented invention. The statute under which the suit was brought provided for

"reasonable and entire compensation for such use." The Court of Claims refused to allow interest to the date of payment upon the sum fixed as damages. This Court reversed and held that "interest should be allowed in order to make the compensation entire."[5] Mr. Justice Holmes referred with approval to *Richmond Screw Anchor Co.* v. *U. S.*, 275 U. S. 331, 343, in which "entire compensation" was defined.

The Government's argument throughout its brief is based on the *assumption* that the award in this case was "interest", as commonly understood.[6] It charged in its petition to this Court for the writ that the Court of Claims "has attempted to create a verbal formula to remove its action from the ambit of Section 177(a) and to place it under rules applicable solely to damage awards appropriate in eminent domain or requisition cases under the Fifth Amendment". The petition furthermore stated that the decision of the Court of Claims herein "underscores a tendency by the Court below to attempt to overcome Section 177(a) and to grant interest whenever in its opinion such interest should be included in its judgment".

The phrase "not as interest but as a part of just compensation" is not a formula invented by the Court of Claims. It has been repeatedly approved in decisions of this Court and in several cases where the Court of Claims

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[5] A similar recent decision is *Marconi Wireless Co.* v. *U. S.*, 99 Ct. Cls. 1.

[6] In *Smythe* v. *U. S.*, 302 U. S. 329, cited by the Government, a Court of Claims case where the United States had redeemed certain of its bonds and suits were brought in the Court of Claims to recover on the interest coupons attached to the bond, the Court reaffirmed the well-known rule that in the absence of contract or statute evincing a contrary intention interest does not run upon claims against the Government. The Court, however, did not have before it any provision requiring an award of "just compensation."

has refused this indentically phrased additional allowance, this Court has reversed that Court and directed that it be made (cases cited *supra*).[7]

The Government argues that the decision of the Court of Claims herein is in direct conflict with the decision of this Court in *U. S.* v. *Goltra*, 312 U. S. 203. So much reliance has been placed by the Government upon this *Goltra* decision that we desire to analyze it in comparison with our case, as we think that the distinguishing facts of the *Goltra* decision have been ignored or passed over too lightly by the Government.

In the first place, Goltra never had a cause of action against the Government until Congress passed a remedial statute eleven years after his alleged cause of action arose. He had prosecuted this cause of action through all the courts, including this Court, without success (*Goltra* v. *Weeks*, 271 U. S. 536). After his defeat Goltra then went to Congress and obtained a special statute conferring jurisdiction on the Court of Claims to determine the "just compensation" to be paid him for the taking of his property, which had been a tortious unauthorized act of an army officer. Now it is observed that Goltra's original claim was, as pointed out in this Court's opinion, an "ordinary" claim for damages. Such a claim even if it had been well founded in the first place would have been barred as to interest by Section 177 of the Judicial Code (*Hooe* v. *U. S.*, 218 U. S. 322).

The special statute under which Goltra ultimately recov-

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[7] An instance in which interest was regarded as an integral part of the principal sum in issue and not within the statutes and decisions exempting the Government is *U. S.* v. *N. Y.*, 160 U. S. 598. This was not a case of taking property but there is a relevant analogy (*U. S.* v. *Highsmith*, 257 Fed. Rep. 401. C. C. A. 1919).

ered was in the nature of a statutory grant and such statutes, as stated in this Court's opinion, are always strictly construed against the grantee. The reason for such a strict construction has been stated to be that "statutes and ordinances embodying such grants are usually drawn by interested parties" (*Russell* v. *Sebastian*, 233 U. S. 195, 205).[8] This Court held in effect that a strict interpretation of the remedial statute invoked by Goltra required a holding that Congress did not intend to award an additional sum of just compensation computed by way of interest covering a period of eleven years. The opinion said:

> "The distinction between property taken under authorization of Congress and property appropriated without such authority has long been recognized. Acts of Government officials in taking property without authorization of Congress confer no right of recovery upon the injured citizen." • • •
>
> "We see no ground to read into this act of grace which was apparently drawn to rectify what Congress felt might be a wrong, an authority to allow interest as a part of just compensation. If interest was to be allowed for so long a period upon an ordinary claim and contrary to established governmental practice, Congress would have so declared."

There had been two other cases of tortious taking at the time of the *Goltra* decision where interest to complete full just compensation had been allowed. They are *U. S.* v. *Creek Nation*, 295 U. S. 103, and *Shoshone Tribe* v. *U. S.*, 299 U. S. 476. But this Court's opinion expressly pointed out that in those cases there had been a ratification by

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[8] Statutory grants are construed strictly in favor of the public. Nothing passes by implication. *Coosaw Co.* v. *So. Carolina*, 144 U. S. 550, 562; *Caldwell* v. *U. S.*, 250 U. S. 14, 20; 59 *Corpus Juris Secundum* 668.

Congressional authority and a confirmation of the tort after the taking.[9]

These salient facts of the *Goltra* case place it entirely apart from the facts of our case. The statute here was not a remedial statute in any sense. It was a mandate definite, clear and precise to the Government authorizing the Government to take over the hotel properties some time in the future either before the expiration of the term of the lease or at the expiration of the term and to pay just compensation therefor. It is based on that authority that the Government took our property and the Secretary of War in his letter in which he gave notice of the taking indicated that he was relying upon our statute (R. 17).

The statute and lease in our case were drawn by the Government, not drawn as in the case of statutory grant, by the recipient, or his friends, of the grant. The drafting of the statute and lease was the work of the Government. If a strict construction is required of the phrase "just compensation for the construction of the hotel, appurtenances and equipment" then on fair legal principles such construction must be in our favor.[10] (17 *Corpus Juris Secundum*, Contracts, Sec. 324.)

There has never been any question about the Government's liability to us, as there was in the *Goltra* case, and

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[9] The Government cites *Viriginia Engineering Company, Inc. vs. U. S.*, 89 Ct. Cls. 457, where interest was allowed in a non-eminent domain case. The Government states that this case was on all fours with the *Goltra* case. It seems to us that the *Virginia* case is not at all like the *Goltra* case in that there had been no tortious taking whatsoever. No appeal was taken from the *Virginia* decision. We think the rules of law expressed by the Court below in that case are applicable to ours.

[10] Before the Court of Claims the Government asserted that the phrase "just compensation for the construction of the hotel, appurtenances and equipment" was not free from ambiguity (p. 172, Government's Brief Ct. Cls.).

we require no remedial statute to support that liability. We had no "ordinary" claim any more than a claim under eminent domain is an "ordinary" claim.

It therefore seems to us that the *Goltra* decision on which the Government leans so heavily is not in point in our case at all.[11] Indeed, as we read the *Goltra* decision the implication is plain that had there not been a tortious taking and had there not been the question of construing a remedial statute to cover a period of eleven years, the additional award by way of interest would have been sustained.

II.

The right to full compensation to the date of payment does not depend upon whether the Government took our property under the power of eminent domain. Nor does it depend upon any particular kind of "taking". The decisive circumstance is that the Government took our property pursuant to and under the authority of an Act of Congress which gave just compensation when the property was taken. There can be no plausible distinction between the just compensation awarded in eminent domain or military requisition cases and the just compensation under our statute.

The Government, adopting the premise that the additional amount awarded by the Court of Claims was strictly "interest", argues that only in eminent domain cases is interest allowed, and that since this is not an eminent domain case the "interest" allowed by the Court below was improper. Two sentences from the Government brief in this connection are significant and indicate, it seems to us,

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[11] *U. S.* v. *North American Company*, 253 U. S. 330, cited frequently in the Government's brief was also a case of tortious taking and was so distinguished in later decisions. (*Jacobs* v. *U. S.*, 290 U. S. 13.)

how thinly drawn the Government's argument is in comparing an "eminent domain" case and our case. They say:

> "Where private property is taken *in invitum* by the Government the Constitution demands that the owner be made whole as of the time he loses use or possession of the property; when payment is deferred interest is necessary to produce the full equivalent of the property's value paid contemporaneously with the taking. But where the Government does not impose its will upon the owner, and he is free to sell his property and to bargain for the terms of its sale, there is neither Constitutional nor policy reason to assure him of this full measure of protection" (p. 13).

In a consideration of this statement by the Government, let it be observed first that the Hotel Company herein was not like the usual property owner and was not "free to sell its property or to bargain for the terms of its sale". It could not assign or transfer the lease without the approval of the Government (R., p. 12). It could do nothing except to seek "just compensation" if, as and when the Government took the property. Until the actual expiration of the 50 year term of the lease the Company had no right to any compensation from the Government under any circumstances unless the Government took its property. Furthermore, there was no obligation or contract or promise on the part of the Government to take over the property if the Hotel Company defaulted *before the expiration of the term of the lease.*[12] The provisions covering the conditions that arose here and under which the Government took the property are explicit (R., 11). They provide that this lease

[12] As further support for this statement it is noted that when the original hotel corporation previously defaulted, the Government did not elect to take possession of the hotel property and terminate the lease (R. 24-26).

"may" be annulled at any time by the Secretary of War should the lessee fail to observe the conditions of the lease, and then the Secretary of War "may" declare the lease forfeited and "thereupon just compensation shall be made to the party of the second part or his assigns for the construction of said hotel, appurtenances and equipment". This all applied to the termination of the lease by an act of taking prior to the expiration of the term.

When the Company wrote to the Secretary of War it did not know whether the Government would take this property or not if it ceased operating the hotel. The term of the lease then had more than 31 years to run. The Company had no assurance or contract that the lease would be *terminated* by the Government and just compensation paid. It was not until the Secretary of War elected to take possession of the hotel properties that the right to just compensation accrued. It is apparent that the Secretary of War treated this "taking" as analogous to an eminent domain case, because he stated in his letter that condemnation proceedings would be brought to determine "the just compensation to be paid to the owners in accordance with the statute" (R., 17), and condemnation proceedings were thereafter commenced by the Government (*supra*, p. 13).[13]

In the Government's petition for a writ herein this statement is made: "Concededly, an award of damages under the Fifth Amendment for a taking of property includes interest from the date of taking if payment be delayed. * * * But the essential element which justifies the use of this measure of damages is the existence of an actual taking".

[13] Before the Court of Claims in this case the Government strongly argued that this was an eminent domain case and that when Congress used the words "just compensation" it must be considered in the absence of a very strong showing of contrary intent, to have used them in the sense of eminent domain (p. 173, Gov. Brief before the Court of Claims).

The Government has stated in its brief that the condemnation proceedings are now moot. (R. 18) They are not moot however as an indication of how the Government, before it reached this Court, interpreted the remedy of just compensation herein. And we believe that our right to full just compensation to the date of payment is not conditional upon the form of remedy.

In *Jacobs* v. *U. S.*, 290 U. S. 13, where the owner brought suit to recover for the taking of his land, this Court reversed the Court below which had refused to allow interest to the date of payment. The Court said:

> "The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of their claim. The form of remedy did not qualify the right."

The Court below in its finding of fact found that on March 10, 1943—

> "* * * the Secretary of War for and in behalf of the defendant, acting through its agents and representatives and pursuant to the provisions of the lease, took over possession and occupation and management of the said hotel and all its properties, appurtenances, and equipment, and has ever since continued in possession, management, operation, and control of the same" (R. 29).

When the Secretary of War took possession of our property, the only authority under which he could act in such taking was by virtue of our Statute. Such authority could not be conferred upon him by any letter written by the Hotel Company or by any letter in reply thereto written by him, and the right of election to take the property rested entirely with the Government. There is no question of

right by contract here (*DeLaval* v. *U. S.*, 284 U. S. 61, 66). Our people had no rights whatsoever until possession of our property was taken, and then our rights came not by virtue of any letters or contract with the Secretary of War, but by virtue of an Act of Congress.

We see no justification for the statement in the Government brief that we have "studiously ignored" the actual transactions leading up to our demand for just compensation (R. 46). On the contrary we wish to emphasize them, because they were in actual contemplation of the Government as Lessor and the respondent as Lessee. When the Act was passed it provided for the payment of just compensation upon the "termination" of the lease. That termination had to be necessarily, either at the expiration of the term or prior thereto. The lease expressly provided for a default by the lessee during the term of the lease. But it did not obligate the Government to terminate the lease when the default occurred, and the statement in the Government brief that the default "caused the Secretary of War to annul the agreement" is not accurate (R. 46).

The letters between the respondent and the Secretary of War have been set forth in full in this brief. Our letter stated expressly, "this communication is not intended and should not be construed as a notice of default on our part" (R. 15). We informed the Secretary of War of existing conditions affecting the operation of the hotel which were not anticipated by the parties when the lease was made. In January 1943 when the letter was written it is not difficult to perceive what those conditions were. Our letter was simply an inquiry of the Secretary of War as to what course he would take if we closed the hotel. Would he forfeit the lease "to the end that the company shall be entitled to just compensation as provided in the lease"? (R. 15).

The Secretary of War's reply was prompt (R. 16). He set forth the procedure we were to follow. No compulsion on him is indicated in his letter, but he did say that if we defaulted as outlined by him he would act under the Statute and, as to "just compensation" to be paid to the owners "it will be necessary for the Government to comply with the Statute" (R. 17).

It does not seem to us that our right to "just compensation" as provided by the Statute was intended to rest upon any nice and finely drawn distinction between the taking in an eminent domain case and the taking under the express authority of our Statute. We are in an exactly similar position to the property owners whose property is taken under requisition acts[14] (*Phelps* v. *U. S., supra; Waite* v. *U. S., supra*).

The Court of Claims in its opinion said (R. 38): "Both statute and contract expressly provide for the payment of just compensation. The compensation payable must be no less just than that payable under the Fifth Amendment. There is no plausible distinction."

When Congress by a statute contemplated and provided for the future deprivation of our property by the Government, what is the essential difference between this authority conferred on the Government by this special Statute and the authority of the requisition statutes or the taking contemplated by the Fifth Amendment? What is there to indicate that Congress had in mind any different kind of just compensation to be awarded when and if the Government elected to take our property prior to the expiration of the

[14] In *Kepner* v. *U. S.*, 195 U. S. 100, it is stated that the rule of construction is well settled that language used in a statute which has a settled meaning sanctioned by judicial decisions is presumed to be used in that sense by the legislative body. (*Yankton Sioux Tribe* v. *U. S.*, 272 U. S. 351; 65 Ct. Cls. 427, cert. denied 277 U. S. 607).

term and the kind of just compensation for the taking of the property under any requisition statute or under eminent domain?[15]

III.

The legislative history of the act indicates that Congress intended to make the Lessee whole when its property was taken over by the Government prior to the expiration of the term of the lease.

"Just compensation" is mentioned in four different provisions of this lease. It comes first in connection with the provision relating to the passing of title when the lease comes to an end (R. 10). It provides that title to said building or buildings shall pass at once to the United States "subject to the provisions herein contained for the payment by the United States of America to the party of the second part of just compensation therefor". Another provision covers the termination of the lease at the *expiration* of the term reserved, and provides for "just compensation for the construction of said hotel, appurtenances and equipments" which may *then* be upon the premises (Italics ours) (R. 11). Still another provision provides for just compensation when the lease is declared forfeited by the Secretary of War, as happened in this case, *prior to the expiration* of the term of the lease, and provides that "just compensation shall be made to the party of the second part for the construction of said hotel, appurtenances and equipments" (R. 11). One further provision provides for just

[15] We have examined the many decisions and Attorney General opinions cited in the Government's brief which are based upon the general rule forbidding "interest" against the Government. In our opinion they are not applicable to the facts in the instant case, and for purposes of brevity we have refrained from detailed comment of them. It is noted that the quotation from 17 *Corpus Juris* 716 on page 21 of the Government's brief (footnote) is not complete.

Because it did not say so, we are led irresistably to the conclusion that it did not intend to negative the effect of § 177 (a) in this instance. *Tillson* v. *United States*, *supra*.

We therefore reverse the judgment of the Court of Claims to the extent that it includes an allowance for interest.

compensation in the event that the Government should erect or permit the erection of another hotel at West Point; then the lease may be terminated "and the party of the second part shall thereupon become entitled to just compensation as above provided as of the date of such termination" (R. 12). It will be observed in a consideration of these provisions that there was no obligation to pay the Hotel Company just compensation except at the expiration of the term of the lease. In the instance of a termination prior to the expiration of the term the Government had the option to terminate the lease and thus bring into effect the payment of just compensation to the Hotel Company.

It is permissible in an interpretation of an Act of Congress to refer to the reports of a Committee including the bill as introduced, changes made in the frame of the bill in the course of its passage, and statements made by the Committee in charge of it (*U. S.* v. *St. Paul M. & N. Railway Company*, 247 U. S. 310, 318).

The Act of Congress herein was not the result of hasty legislation. The question of constructing a hotel at West Point was before Congress for considerably over a year. The first Statute passed on March 4, 1919 (40 Stat. 1348) authorized the Secretary of War to allow the erection at West Point of a hotel and provided that the corporation, company, or individual that erected such hotel would "enjoy the revenue therefrom for a period of fifty years; after which time said property shall become the property of the United States". Congress found that nobody would build a hotel under this Statute, and then passed the Act of March 30, 1920 which for the first time provided for "just compensation" to be paid to the lessee "for the construction of said hotel, appurtenances and equipments". Thus we see that Congress had to offer "just compensation" to a lessee in order to persuade private capital to con-

struct and operate the kind of hotel which was desired for governmental purposes.

An examination of the debates that occurred in Congress in February 1919 shows clearly not only the desire of the Government but also the necessity of having a hotel at West Point to furnish services and facilities required by the Government, its officers and agents at that military reservation (65th Congress, 3rd Session, Report No. 1019).

In February 1920 a new amendatory statute came before the House in which the provision of just compensation for the construction, etc. of the hotel was inserted for the first time (Congressional Record Vol. 59, pp. 3031-3032). The discussion that took place then is quoted in part on page 34 of the Government's brief herein. It will be observed in the statement of one of the Congressmen that the right of election to the Government to take the property was an important factor and that the legislators were recognizing the necessity of awarding "an equity to investors which will recompense them for the sum invested".

The burdensome regulations which were expected to be imposed by the Government upon the lessee were referred to in these discussions and it was recognized that a special or unusual compensation would have to be given to attract a builder and lessee. It is also noted that the Government contemplated the possibility of wanting to take back the hotel at the end of 15 or 20 years, which was in fact exactly what took place. The hotel was not a "money proposition". It was the opposite from a "commercial speculation" (Congressional Record, Vol. 57, pp. 2672-2674). Again it was recognized in the Congressional discussions that there would be "no certainty of a more or less fixed income on the part of the hotel man" and that there was nothing to "tempt anybody to put any money in such a venture unless there be something like a liberal concession on the part

of the Government" (Congressional Record, Vol. 59, pp. 3031-3032; 66th Congress, February 1920).

Certain Senators questioned the meaning of the clause providing for the acceptance of the title by the Secretary of War at any time which was contained in the first statute enacted (66th Congress, Second Session, Vol. 55, p. 3672). As a result, in a Committee report the proposed statute was drafted in exactly the same phraseology as the statute which was finally adopted and acted upon herein (66th Congress, Second Session, Report No. 154, March 19, 1920).

A consideration of the whole legislative history of the Act leads to the reasonable conclusion that when Congress used the words "just compensation to the lessees for the construction of said hotel, appurtenances and equipments" it intended a form of compensation which would constitute full and complete payment to the lessee when it was deprived of its property. Had Congress intended any other form of compensation it would have been a simple matter to have provided expressly for it.

The Government's brief presents what it calls the concept of "just compensation" prevailing in 1920, when our Act was passed. It is argued on the basis of this concept that Congress could not have intended that "interest" be paid as a part of just compensation because such "interest" was not awarded by this Court until after 1920.

This argument might be more plausible if it were not for the decisions of this Court in *Waite* v. *U. S.*, 282 U. S. 508; *Yankton Sioux Tribe* v. *U. S.*, 272 U. S. 351; *U. S.* v. *Rogers*, 257 Fed. Rep. 397, aff'd 255 U. S. 163; *U. S.* v. *Sargent*, 162 Fed. Rep. (C. C. A.) 81.[16] All these decisions

[16] Other decisions are *Seaboard Air Line* v. *U. S.*, 261 U. S. 299; *Jacobs* v. *U. S.*, 290 U. S. 13; *DeLaval* v. *U. S.*, 284 U. S. 61. A statement of the principles involved is found in 20 *Corpus Juris*, Eminent Domain, 806.

concerned and related to statutes which were passed by Congress prior to 1920. In all of them the Court supported the award of interest as a part of just compensation. It seems strange to us that the concept of just compensation as evolved in the Government's brief herein was not successfully invoked in any of those cases.

It is not our contention that "just compensation" are words of art, as asserted in the Government's brief. Our position is that the words "just compensation for the construction of the hotel, appurtenances and equipment" were reasonably intended to mean full and complete compensation to the date of payment. The Government's brief gives no effect whatsoever to the phrase "for the construction of the hotel" etc. It treats that language as surplusage or ignores it entirely. But the rule is that a statute is to be construed, if possible, so that no clause, sentence or word shall be superfluous, void or insignificant, giving to all words used their proper signification and effect (*Montclair Twp.* v. *Ramsdell*, 107 U. S. 147; *U. S.* v. *Lexington Co.*, 232 U. S. 399). It cannot be presumed that Congress intended that these words should have no meaning.

The Government refers in its brief to "just compensation" applying to damage cases, public utility cases and others. We are not concerned here with "just compensation" alone or with the facts of those cases (59 *Corpus Juris*, Statutes, p. 995). The way was open for Congress to fix any established method of compensation it wished. It could have provided for the fair and reasonable value of the properties on the day when the lease was terminated, or when the Government took possession which is what the Government is contending for here. But it does not seem reasonable to us that Congress would have employed the phraseology of the lease if it had intended such a simple formula.

In *Monongahela Navigation Co.* v. *U. S.*, 148 U. S. 312 (1892) this Court considered at some length the meaning of "just compensation" under a statute passed in 1888, and held that the compensation must be a full and perfect equivalent for the property taken. It may be presumed that the "concept" of just compensation set forth in this decision might well have been in contemplation of Congress when it passed our Act in 1920.

In *Jacobs* v. *U. S.*, 290 U. S. 13 this Court considered the concept of just compensation in words pertinent to our case, as follows:

> "The concept of just compensation is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. The owner is not limited to value of the property at the time of taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking."

IV.

The Court of Claims was authorized by statute to find "just compensation for the construction of the hotel, appurtenances and equipment". A finding of the "fair and reasonable value" of the hotel property is not a finding pursuant to the statute as the Court below properly held.

The Government has accepted without objection a finding of fact of the Court below that the fair and reasonable value of the hotel properties as of March 10, 1943 was $867,682. It argues in effect that this is the total recovery that can be had. It must follow, therefore, from its argument that the fair and reasonable value on March 10, 1943

is synonymous with "just compensation for the construction of the hotel buildings and equipment". We find nothing in the Statute or lease to justify this assumption.

The actual termination of the lease as a matter of fact did not take place until March 24, 1943 when the Secretary of War served notice of annulment (R. 29) and it was not until then that title passed to the Government subject to the payment to the lessee. The Court of Claims was not limited to a finding of fair and reasonable value as of March 10, 1943.

The Government contends, in effect, that all value that resulted from the possession and operation of this hotel property and business after March 10, 1943 disappeared immediately, so far as Respondent is concerned, when the properties were taken by the Government; that it makes no difference when Respondent is paid for its properties or how much the Government is profiting therefrom; that the fair and reasonable value on March 10, 1943 which concededly does not include anything for the use of our property is the sole measure of just compensation to us.

We do not think this is what was intended by Congress, or what is meant in law and in equity to be "just compensation".

Conclusion.

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed in all respects.

December 1946.

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Of Counsel.

SUPREME COURT OF THE UNITED STATES

No. 106.—October Term, 1946.

United States, Petitioner, v. The Thayer-West Point Hotel Company.	On Writ of Certiorari to the Court of Claims.

[January 20, 1947.]

Mr. Justice Murphy delivered the opinion of the Court.

The decision here turns upon the power of the Court of Claims, in light of § 177 (a) of the Judicial Code,[1] to include interest in its award of "just compensation" to a lessee for the construction of a hotel and other buildings pursuant to the provisions of the Act of March 30, 1920.[2]

The Act of March 30, 1920, authorizes the Secretary of War to lease land on the United States Military Reservation at West Point, N. Y., to any person for a term not exceeding 50 years upon which to erect a hotel and other necessary buildings in connection therewith. The lease is to contain such conditions, terms, reservations and covenants as may be agreed upon and is to provide "for just compensation to the lessees for the construction of said hotel, appurtenances, and equipments, to be paid to said lessees at the termination of said lease."

On October 17, 1924, the Secretary of War duly made a lease under this Act to one Williams for a period of 50 years. The lease provided, among other things, that it might be canceled at any time by the Secretary if the lessee should fail to observe all the covenants and conditions in the lease. One of the covenants was that the lessee was to "keep the said hotel open for business every day during the continuance of this lease, except at such times as per-

[1] 28 U. S. C. § 284 (a).

[2] 41 Stat. 538, 548.

mission to close may be given in writing by the Superintendent, U. S. M. A." Upon a cancellation of the lease, "just compensation" was to be paid to the lessee for the construction of the hotel, appurtenances and equipment, and title thereto was to pass at once to the United States. Similar provisions were made in connection with the termination of the lease on the expiration of the 50-year term. The lease also set forth numerous restrictions and requirements as to the operation of the hotel—such restrictions and requirements being primarily for the benefit of the Military Academy.

The lease was assigned to a corporation and a hotel and other buildings were subsequently erected. Through a series of events which need not be detailed here, the respondent took over the leasehold and the hotel properties in 1930 with the approval of the Superintendent of the Military Academy. Respondent began operating the hotel on January 1, 1931, and continued under the terms of the lease until March 10, 1943.

On January 5, 1943, respondent wrote to the Secretary of War that conditions then existing made continued operation of the hotel impossible and that to avoid a curtailment of operations or a closing down of the hotel the properties should be owned and operated by the Government." It was accordingly suggested that the Secretary declare the lease forfeited upon the closing of the hotel by respondent, a default contemplated by the lease. The Secretary agreed to this proposal. The respondent then gave notice of its intention to close the hotel on the morning of March 10, 1943. The agents of the Secretary immediately took over the possession, management and operation of the hotel on March 10 and shortly thereafter the Secretary declared the lease annulled.

The parties were unable to agree on the amount of "just compensation" due under the lease. Respondent then brought this suit in the Court of Claims, praying for a

judgment in the sum of $1,932,000. That court found that the "total of just compensation to the plaintiff for construction of the hotel, its appurtenances, and equipments, is therefore $867,382, as of March 10, 1943." 64 F. Supp. 565, 568. The court then added interest at the rate of 4% per annum from March 10, 1943, to the date of payment as "additional allowance to make compensation a just one as of the date of payment." The sole question before us concerns the propriety of adding the 4% interest from March 10, 1943.

The pertinent part of § 177 (a) of the Judicial Code provides that "No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, . . ." Section 177 (a) thus embodies the traditional rule that interest cannot be recovered against the United States upon unpaid accounts or claims in the absence of an express provision to the contrary in a relevant statute or contract. *Tillson* v. *United States*, 100 U. S. 43, 47; *United States v. North American Co.*, 253 U. S. 330, 336; *United States* v. *Goltra*, 312 U. S. 203, 207. This rule is inapplicable, however, where the United States takes property under its power of eminent domain; in such cases it has consistently been held that the Fifth Amendment's reference to "just compensation" entitles the property owner to receive interest from the date of the taking to the date of payment as a part of his just compensation. *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123; *Phelps* v. *United States*, 274 U. S. 341, 344.

Since it is clear in the instant case that the United States did not exercise its power of eminent domain and that there was no taking of the hotel properties in the legal sense, we can put to one side the eminent domain situation. There is nothing more here than an ordinary

contractual relationship between the United States and the respondent. That relationship was voluntarily entered into by respondent's predecessor and was severed at respondent's suggestion. The Government's liability to pay for the construction of the hotel properties was fixed by the Act of March 30, 1920, and by the lease, not by the Constitution. The sole issue thus becomes whether there is any express provision in the Act or in the lease permitting the recovery of interest under the circumstances. Only if there is such a provision can respondent avoid the traditional rule set forth in § 177 (a).

Respondent's claim in this respect rests upon the references in the Act and in the lease to the payment of "just compensation" for the construction of the hotel, appurtenances and equipment. "Just compensation," it is said, is to be given the same meaning here as in the case of a taking under the power of eminent domain, thereby entitling respondent to the full value of the properties down to the date of payment. From this viewpoint, the Court of Claims could use interest at the rate of 4% as the measure of the value of the use of the hotel properties from the time when the Government took possession on March 10, 1943, to the time of payment and include such interest as a component part of just compensation. The conclusion is reached that the term "just compensation," as used in the Act and in the lease, constitutes an express provision for interest so that the bar of § 177 (a) is removed. We cannot agree.

The fact that "just compensation" includes interest in the eminent domain setting does not necessarily mean that the term must be given the same scope in other situations. *United States* v. *Goltra, supra.* It may or it may not imply an obligation to pay interest. For example, interest conceivably may not be contemplated where the term refers to compensatory damages for a tort or a breach of contract, or where it has reference to the price to be paid

for the exchange or sale of property at a future date. Hence, in the absence of constitutional connotations, "just compensation" is not a term of art so far as interest is concerned. The inclusion or exclusion of interest depends upon other contractual provisions, the intention of the parties and the circumstances surrounding the use of the term.

But in order to override the historical rule codified in § 177 (a), something more is necessary than an equivocal use of the term "just compensation." It is not enough that the term might be construed to include the payment of interest. As § 177 (a) itself indicates, there must be a provision in the contract "expressly stipulating for the payment of interest." That provision must be affirmative, clear-cut, unambiguous; and an unexpressed intention by the parties that the term "just compensation" be construed to include interest is insufficient. Likewise, where a statute is relied upon to overcome the force of § 177 (a), the intention of Congress to permit the recovery of interest must be expressly and specifically set forth in the statute. *Tillson* v. *United States, supra,* 46; *United States ex rel. Angarica* v. *Bayard,* 127 U. S. 251, 260. Mere use of the term "just compensation," without more, is no substitute for an express provision for interest.

Here neither the Act of March 30, 1920, nor the lease under which respondent operated contains an express provision for the payment of interest, either in addition to or as a part of the "just compensation" to be paid to respondent. If the United States had desired to provide by statute or to contract in the lease for the payment of interest it would have been easy to have said so in express terms.[3]

[3] Congress has expressly provided for the payment of interest in other instances. See Judicial Code, § 177 (b), 28 U. S. C. § 284 (b); Contract Settlement Act of 1944, 58 Stat. 649, 654; § 6 (f), 41 U. S. C. Supp. V, § 106 (f).